TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 310.

THE PEOPLE OF THE STATE OF NEW YORK *EX REL.* ALBERT J. HATCH, PLAINTIFF IN ERROR,

vs.

EDWARD REARDON, A PEACE OFFICER OF THE COUNTY OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED JUNE 2, 1906.

(20,275.)



(20,275.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 310.

THE PEOPLE OF THE STATE OF NEW YORK *EX REL.* ALBERT J. HATCH, PLAINTIFF IN ERROR,

vs.

EDWARD REARDON, A PEACE OFFICER OF THE COUNTY OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Papers on appeal to court of appeals	*a*	1
Statement under rule 41	1	1
Petition for writ of *habeas corpus*	2	1
Exhibit A—Warrant	7	5
B—Affidavit of complaint	8	6
C—Entries in journal of assembly	10	7
Writ of *habeas corpus*	13	9
Return to writ of *habeas corpus*	14	9
Exhibit A—Affidavit of complaint	15	10
B—Warrant	17	11
C—Writ of *habeas corpus*	18	12
Answer to return to writ of *habeas corpus*	19	12
Final order appealed from	20	13
Notice of appeal	22	14
Affidavit of no opinion	23	14
Stipulation waiving certification to appellate division	24	15
Order of affirmance by appellate division	25	15
Notice of appeal to court of appeals	26	16

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 22, 1906.

	Original.	Print.
Opinions in appellate division—Laughlin, J	28	17
Ingraham, J. (dissenting)	41	25
Stipulation waiving certification	53	33
Remittitur from court of appeals	54	33
Order on remittitur	56	34
Writ of error	60	36
Petition for writ of error	62	37
Order allowing writ of error	64	38
Assignment of errors	66	38
Citation	69	39
Acceptance of service of citation	70	39
Bond on writ of error	72	40
Clerk's certificate	75	41
Opinion of court of appeals	76	42
Clerk's certificate	103	59

a In the Court of Appeals of the State of New York.

On Appeal from Appellate Division of the Supreme Court, First Department.

PEOPLE OF THE STATE OF NEW YORK *ex Rel.* ALBERT J. HATCH,
Appellant,
against
EDWARD REARDON, a Peace Officer of the County of New York,
Respondent.

Papers on Appeal from Order of Affirmance of Final Order Dismissing Writ of *Habeas Corpus*.

Carter, Ledyard & Milburn, Attorneys for Relator and Appellant.
Julius M. Mayer, Attorney General.
Wm. Travers Jerome, District Attorney of the County of New York, and Attorney for Respondent.

1 Appellate Division of the Supreme Court, First Department.

PEOPLE OF THE STATE OF NEW YORK *ex Rel.* ALBERT J. HATCH,
Appellant,
against
EDWARD REARDON, a Peace Officer of the County of New York,
Respondent.

Statement under Rule 41.

This proceeding was commenced on June 8th, 1905, by the filing of the petition of the relator.

The writ of *habeas corpus* was issued on June 8th, 1905.

The return to the writ was filed on June 8th, 1905.

The answer to the return to writ was filed on June 8th, 1905.

The final order dismissing the writ of *habeas corpus* was entered and filed on June 8th, 1905.

No change in original parties or their attorneys.

2 *Petition for Writ of Habeas Corpus.*

To Hon. John Proctor Clarke, one of the Justices of the Supreme Court of the State of New York:

The Petition of Albert J. Hatch respectfully shows:

That he resides in Stamford, Connecticut, and is a citizen of the State of Connecticut, and that he is now restrained of his liberty, in the Borough of Manhattan, City and County of New York, by one Edward Reardon, a peace officer of the County of New York.

That to the best of his knowledge and belief he has not been committed and is not detained by virtue of any mandate issued by a

court or a Judge of the United States; nor by virtue of a final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or a final order of such a tribunal made in a special proceeding instituted for any cause, nor by virtue of an execution or other process issued upon such a judgment, decree or final order.

That the cause or pretence of such restraint according to the best knowledge and belief of your petitioner is as follows:

On the 8th day of June, 1905, your petitioner was arrested by said peace officer by virtue of a warrant of arrest issued by the Hon. John B. McKean, a Justice of the Court of Special Sessions in the City of New York for the First Division, sitting as a Magistrate, on the charge of having sold in the Borough of Manhattan, City, County and State of New York to Charles W. Maury on the 7th day of June 1905, one hundred shares of the common capital stock of the Southern Railway Company, a corporation organized under and by virtue of the laws of the State of Virginia and owning and operating a system of railroads situated wholly without the State of New York, of the par value of One hundred dollars per share, for the sum of thirty dollars and seventy five cents per share in cash, that being the then market value of said shares; and one hundred shares
3 of the common capital stock of the Chicago, Milwaukee and St. Paul Railroad Company, a corporation organized under and by virtue of the laws of the State of Wisconsin, and owning and operating a system of railroads, situated wholly without the State of New York, of the par value of one hundred dollars per share, for the sum of one hundred and seventy-two dollars per share in cash, that being the then market value of said shares; and of having on said 7th day of June, 1905, in the Borough of Manhattan aforesaid, in pursuance of such sale and on the payment of the sum of Twenty thousand two hundred and seventy-five dollars ($20,275.), the total purchase price of such shares, by said Charles W. Maury to him, delivered to said Charles W. Maury two certificates of stock representing such shares issued by said companies respectively, assigned in blank, without making and delivering to said Charles W. Maury any bill or memorandum of such sale whatsoever, and without affixing to any bill or memorandum thereof, or to any other paper, any stamp or stamps, and without paying any tax on making such sale and delivery, though requested by the said Maury so to do, in alleged violation of the provisions of an alleged Act of the Legislature of the State of New York, entitled "An act to Amend the Tax Law by providing for a tax on transfers of stock" and known as Chapter 241 of the Laws of 1905.

That a copy of said warrant is hereto annexed marked "Exhibit A" and made a part of this petition.

That a copy of the depositions upon which said magistrate issued said warrant is hereto annexed, marked "Exhibit B," and made a part of this petition.

That your petitioner is still in the custody of said peace officer by virtue of said warrant.

That such imprisonment of your Petitioner, or restraint of his

liberty, is illegal on the following grounds and for the following reasons:

That said Justice was without jurisdiction to issue said warrant and cause the arrest of your Petitioner thereunder, and said warrant is null and void, because the alleged act of the Legislature hereinbefore mentioned, entitled "An Act to amend the Tax Law by providing for a tax on transfers of stock," for an alleged violation of which said warrant of arrest was issued as aforesaid, is unconstitutional and void.

4

That said alleged Act is in violation of Section Six of Article One of the Constitution of the State of New York in that it deprives your Petitioner of his property without due process of law and without just compensation:

That said alleged Act is in violation of the Constitution of the State of New York because in imposing a tax upon sales and transfers of one species of property only, when sales and transfers of no other species of property are taxable under the laws of the State of New York, it is grossly unequal in its operation, a purely arbitrary exaction founded upon no rule of equity or justice, an arbitrary discrimination against the owners of a single species of property, and the imposition of a grossly disproportionate share of the burden of taxation for State purposes on the owners of a single species of property, selected for the sole and only purpose of the imposition of said tax:

That said alleged Act is also in violation of the Constitution of the State of New York because the said tax thereby imposed upon a single kind of property is unequal in amount for that the same amount of tax is imposed upon the face or nominal value of the shares of stock irrespective of their actual value; and your Petitioner avers that the market and actual value of many of the stocks of both foreign and domestic corporations upon which the said alleged Act operates are much less than their par value, and the market and actual value of many of them is much more than their par value; and that the tax imposed by said alleged Act upon the aforesaid sale and transfer by him of the one hundred shares of the capital stock of the Southern Railway Company is much greater in amount than the tax imposed thereby upon the sale and transfer of shares of other stocks belonging to other persons:

5

That said alleged Act is in violation of the Fourteenth Article of Amendment to the Constitution of the United States in that it deprives your Petitioner of his property without due process of law and denies to him the equal protection of the laws:

That said alleged Act never became a law for the reason that at the time of its final passage by the Assembly it had not been printed and upon the desks of the members of that body in its final form three calendar legislative days as required by section fifteen of Article three of the Constitution of the State of New York, and neither the Governor, or the acting Governor, had certified to the necessity of its immediate passage under his hand and the seal of the State, or otherwise. That said Act originated as a bill in the Senate, and was amended from time to time when pending in the Senate,

and reprinted whenever so amended. That after its final passage by the Senate on the 3rd day of April, 1905, it was on the 4th day of April, 1905, sent by the Senate to the Assembly for its concurrence, with a certificate of its final passage by the Senate, and was on said 4th day of April, 1905, for the first time received by the Assembly and by it then and there read for the first time and referred to its Committee on Taxation and Retrenchment, which Committee on the same day reported in favour of the passage of the bill without amendment, which report was thereupon agreed to and the bill placed on the order of second reading. That on the 5th day of April, 1905, the said bill was read the second time and placed on the order of third reading. That on the said 5th day of April, 1905, the said bill was by unanimous consent read a third time, and was thereupon put upon its final passage and passed by the Assembly on the said 5th day of April, 1905, and by it returned to the Senate with a message that the Assembly had concurred in the passage of the same; and it was by the Senate sent to the Governor who approved it on the 19th day of April, 1905. That when so finally passed by the Assembly said bill after its passage by the Sen-
6 ate had only been on the desks of the members of the Assembly from the time it was received by the assembly on April 4th, 1905, to the time of its final passage on April 5th, 1905; and so your Petitioner says that the said pretended Act was not passed and did not become a law because it had not been printed and upon the desks of the members of the Assembly in its final form at least three legislative days prior to its final passage by that body, as prescribed by Section 15 of Article Three of the Constitution of the State of New York and neither the Governor nor the Acting governor had certified to the necessity of its immediate passage under his hand and the seal of the State, or otherwise.

That annexed hereto, marked "Exhibit C" and made a part hereof, are true copies of the entries in the Journal of the Assembly concerning such Act or Bill.

That printed copies of the said bill as introduced in the Senate, and as amended by the Senate from time to time, were according to a general practice which is not required or prescribed by any rule of the Legislature or of either the Senate or Assembly, placed on the desks of the members of Assembly when so introduced and amended; and printed copies of it as a Senate bill in the form in which it was passed by the Senate had prior to its passage by the Senate been placed upon the desks of the members of the Assembly. That only in such form and under such conditions was it upon the desks of the members of the Assembly in its final form three calendar legislative days prior to its final passage by the Assembly as stated in the Minutes of the Assembly hereto annexed as Exhibit C.

Your petitioner applies hereon for a Writ of *Habeas Corpus*, and no prior or other application has been made therefor to any other Court or judge.

Wherefore your Petitioner prays that a writ of *Habeas Corpus* may forthwith issue directed to Edward Reardon, Peace Officer as aforesaid, commanding him, the said Peace Officer, forthwith to pro-

duce the body of your Petitioner Albert J. Hatch, by him
7 imprisoned and detained, before a Justice of the Supreme Court, together with the cause of such imprisonment and detention, so that the cause of the imprisonment or restraint of your petitioner may be inquired into to the end that he may be delivered therefrom.

Dated June 8th, 1905.

ALBERT J. HATCH.

CITY AND COUNTY OF NEW YORK, *ss:*

Albert J. Hatch, the above named petitioner, being duly sworn, says that he has read the foregoing petition, and that he believes it to be true.

ALBERT J. HATCH.

Subscribed and sworn to before me this 8th day of June, 1905.

JNO. VIMONT LYLE,
Notary Public, N. Y. Co.

EXHIBIT A.

CITY AND COUNTY OF NEW YORK, *ss:*

In the name of the People of the State of New York to the Sheriff of the County of New York, or to any Marshal or Policeman of the City of New York, or to any Peace Officer in the County of New York, Greeting:

Whereas, Complaint in writing, and upon oath, has been made before the undersigned, one of the Magistrates of the County of New York, by Charles W. Maury, of Noroton, State of Connecticut, that on the seventh day of June, 1905, at the City of New York, in the County of New York, one Albert J. Hatch did commit a mis-
8 demeanor to wit, a violation of Chapter 241 Laws of 1905, by the sale and delivery of certain shares of stock of certain railroad corporations without making any bill or memoranda of such sale or affixing any stamp or stamps to such a bill or memorandum or in any way paying the tax as required by said act.

Wherefore, the said Complainant has prayed that the said Defendant may be apprehended and bound to answer the said complaint.

These are, therefore, in the name of the People of the State of New York, to command you, the said Sheriff, Marshals and Policemen, and each and every of you, to apprehend the said Defendant and bring him forthwith before me, at the Building for Criminal Courts in the said City, or in case of my absence or inability to act, before the nearest or most accessible City Magistrate in this City, to answer to said charge, and to be dealt with according to law.

Dated at the County of New York, this 8th day of June, 1905.

JOHN B. McKEAN,
Justice of the Court of Special Sessions of the First Division of the City of New York.

Exhibit B.

City and County of New York, *ss:*

Charles W. Maury, being duly sworn, deposes and says that he resides at Noroton, Connecticut and transacts business at his office No. 20 Broad Street in the Borough of Manhattan, City, County and State of New York; that he is over the age of twenty one years, and that he is a broker by occupation.

That on the 7th day of June, 1905 one Albert J. Hatch, who resides at Stamford, Connecticut, sold to deponent in the
9 Borough of Manhattan, City, County and State of New York, one hundred shares of the common capital stock of the Southern Railway Company, a corporation organized under and by virtue of the laws of the State of Virginia, and owning and operating a system of railroads situated wholly without the State of New York, of the par value of One hundred dollars per share for the sum of Thirty dollars and seventy five cents per share in cash, that being the then market value of said shares; and one hundred shares of the common capital stock of the Chicago, Milwaukee and St. Paul Railroad Company, a corporation organized under the laws of the State of Wisconsin, and owning and operating a system of railroads situated wholly without the State of New York, of the par value of One hundred dollars per share, for the sum of One hundred and seventy two dollars per share, that being the then market value of said shares; and that on said 7th day of June, 1905, in the Borough of Manhattan aforesaid, the said Albert J. Hatch, in pursurance of such sale and on the payment by me to him of the sum of Twenty thousand two hundred and seventy five dollars, the total purchase price of such shares, delivered to deponent two certificates of stock representing such shares issued by such companies respectively, assigned in blank, without making and delivering to deponent any bill or memorandum of such sale whatsoever, and without affixing to any bill or memorandum thereof, or to any other paper, any stamp or stamps, and without paying any tax on making such sale and delivered, although requested by deponent so to do, in violation of the provisions of an Act of the Legislature of the State of New York, entitled "An Act to Amend the Tax Law by providing for a tax on transfers of stock," known as Chapter 241 of the Laws of 1905.

CHARLES W. MAURY.

Subscribed and sworn to before me this 8th day of June, 1905.

JOHN B. McKEAN,
Justice, Court of Special Sessions First Division
of the City of New York.

10 EXHIBIT C.

STATE OF NEW YORK:

IN ASSEMBLY, *April* 4, 1905.

"The Senate sent for concurrence the Senate bill No. 892 entitled 'An Act to amend the tax law, by providing for a tax on transfers of stock.' (Rec. No. 235) which was read the first time and referred to the "Committee on Taxation and Retrenchment."

"Mr. Wade from the Committee on Taxation and Retrenchment to which was referred Senate Bill, introduced by Committee on Taxation and Retrenchment (No. 892) (Rec. No. 235) entitled 'An Act to amend the tax law, by providing for a tax on transfers of stock,' reported in favor of the passage of same without amendment, which report was agreed to and said Bill placed on the order of second reading."

I hereby certify that the above is a true transcript from the Journal of the Assembly of April 4th, 1905, and the whole thereof relating to Senate bill No. 892 (Rec. 235) entitled "An Act to amend the tax law, by providing for a tax on transfers of stock."

W. K. MANSFIELD,
Journal Clerk.

State of New York May 24, 1905 In Assembly.

STATE OF NEW YORK:

IN ASSEMBLY, *April* 5, 1905.

"The Senate bill (No. 892) (Rec. No. 235) entitled 'An act to amend the tax law, by providing for a tax on transfers of stock' was read the second time.

On motion of Mr. Rogers said bill was placed on the order of third reading.

Mr. Rogers moved a call of the Members of the House.

Mr. Speaker put the question whether the House would
11 agree to said motion and it was determined in the affirmative.

By direction of the Speaker, the clerk called the roll, when the following members responded:—

Messrs. Agnew, Allen, F. E., Allen J. G., Apgar, Bass, Becker, Bedell, Beihilf, Bird, Bisland, Brady, Brooks, Burnett, Burns, Burzynaki, Byrne, Cadin, Cahn, Callahan, Carrier, Coughlan, Charles, E. E., Charles, W. B., Cooke, Coon, Cotton, Coutant, Cowan, Cox, Cunningham, Dale, Dodd, Donovan, Dowling, Ellis, Etzel, Evans, Everett, Fish, Fitzsimmons, Foelker, Foster, Francisco, Freidal, Fuller, Gardner, Gates, Grady, Grattan, Gray, Gurnett, Hackett, Hammond, Hanford, Hapeman, Hartman, Hastings, Hooker, Hooper, Hornidge, Hubbs, Hurd, Kavanaugh, Knapp, La Fetra, La Rue, Leggett, Lewis, Machacek, Maier, Malloy, Mathews, T. F., Matthews, C. R., McKeown, McManus, Mead, Merritt, Miller Monroe, Moreland, Murphy, Newton, Ogden, O'Neil, Palmer, Parker, Patton, Pendry, Perry, Phillips, Plank, Platt, Prentice, Prince, Quinn, Reeve, Reilly, Rigby, Rogers, Rosenstein, Salamon, Sammon, Santee, Schoeneck, Scovill, Shanahan, Sheedy, Sheldon,

Sherry, Shuttleworth, Slocum, Smith, A. P., Smith, A. E., Smith, J. E., Smith, J. T., Smith R. H., Standart, Stanley, Steele, Stevens, Sullivan, Tenjost, Thompson, G. F., Thompson, J. A., Thonet, Tompkins, Waddell, Wade, Wadsworth, Wainwright, Wedemeyer, West, Wemple, Whitney, F. G., Whitney, G. H., Weigand, Wilsnack, Wilson, Wolf, Wood, F. C., Wood, F. X., Yale, Young, Mr. Speaker.

Mr. Rogers moved that the call of the House be made a close call.

Mr. Speaker put the question whether the House would agree to said motion and it was determined in the affirmative.

Debate was had thereon, when Mr. Rogers moved the previous question. Mr. Speaker put the question "Shall the main question be now put?" and it was determined in the affirmative.

By unanimous consent said bill was then read the third
12 time, having been printed and upon the desks of the members in its final form at least three calendar legislative days prior to its final passage.

Mr. Speaker put the question whether the House would agree to the final passage of said bill, and it was determined in the affirmative, a majority of all the members elected to the Assembly voting in favor thereof, and three-fifths being present.

Those who voted in the affirmative were Messrs. Agnew, Allen, F. E., Allen, J. G., Apgar, Bass, Becker, Bedell, Beebe, Beihilf, Brady, Brooks, Burnett, Cadin, Callahan, Carrier, Charles, E. E., Charles, W. B., Coon, Coutant, Cowan, Cox, Cunningham, Dowling, Etzel, Evans, Fish, Francisco, Freidel, Gardner, Gates, Grattan, Gray, Hammond, Hanford, Hapeman, Hastings, Hooker, Hooper, Hubbs, Hurd, Knapp, La Rue, Leggett, Lewis, Maier, Matthews, C. R., Mead, Merritt, Miller, Monroe, Moreland, Murphy, Newton, Ogden, O'Neill, Parker, Patton, Pendry, Perry, Phillips, Plank, Platt, Pratt, Prentice, Reeve, Rigby, Rogers, Santee, Schoeneck, Scovill, Sheldon, Shuttleworth, Slocum, Smith, A. P., Smith, J. E., Smith, J. T., Standart, Stanley, Steele, Stevens, Tenjost, Thompson, G. F., Thonet, Waddell, Wade, Wadsworth, Wainwright, West, Wemple, Whitney, F. G., Whitney, G. H., Wilsnack, Wilson, Wood, F. C., Wood, F. X., Yale, Young and Mr. Speaker.

Ayes 98.

Those who voted in the negative were Messrs. Anderson, Bird, Burns, Burnyski, Byrne, Cahn, Coughlan, Cooke, Cotton, Dale, Dodd, Donovan, Ellis, Everett, Fitzsimmons, Fuller, Grady, Gurnett, Hackett, Hartman, Hornidge, Kavanaugh, La Fetra, Machacek, Malloy, Mathews, T. F., McKeown, McManus, Palmer, Prince, Quinn, Reilly, Rosenstein, Salamon, Sammon, Shanahan, Sheedy, Sherry, Smith, A. E., Smith, R. H., Sullivan, Thompson, J. A., Tompkins, Wagner, Wedemeyer, Weigand, Wolf.

Noes 47.

Ordered. That the Clerk return said bill to the Senate,
13 with a message that the Assembly have concurred in the passage of the same."

I hereby certify that the above is a true transcript from the Journal of the Assembly of April 5th, 1905 and the whole thereof

relating to Senate bill (No. 892 Rec. No. 235) entitled "An Act to amend the tax law, by providing for a tax on transfers of stock."

W. K. MANSFIELD,
Journal Clerk.

State of New York, May 24, 1905, In Assembly.

Writ of Habeas Corpus.

The People of the State of New York to Edward Reardon, a Peace Officer of the County of New York:

We command you that you have the body of Albert J. Hatch by you imprisoned and detained as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Albert J. Hatch is called or charged, before Hon. John Procter Clarke a Justice of the Supreme Court of the State of New York at the County Court House, Borough of Manhattan, City of New York in Special Term Part II immediately after the receipt of this Writ, to do and receive what shall then and there be considered concerning the said Albert J. Hatch, and have you then and there this Writ.

Witness, Hon. John Proctor Clarke a Justice of the Supreme Court of the State of New York at the Borough of Manhattan, City, County and State of New York, this eight day of June in the year Nineteen hundred and five.

By the Court

[SEAL.] THOS. L. HAMILTON, *Clerk.*

4 [Endorsement.]

The within writ is allowed this 8th day of June, 1905.

JOHN PROCTOR CLARKE,
Justice Supreme Court.

Return to Writ of Habeas Corpus.

New York Supreme Court, County of New York.

THE PEOPLE OF THE STATE OF NEW YORK, *ex Rel.* ALBERT J. HATCH
against
EDWARD J. REARDON, a Peace Officer of the County of New York.

To the Honorable, The Supreme Court of the State of New York:

Pursuant to the Writ of *Habeas Corpus* duly issued out of the Supreme Court and dated the 8th day of June, 1905, and directed to me; I, Edward J. Reardon, a Peace Officer of the City of New York, do make return as follows:

I hereby produce the body of said Albert J. Hatch referred to in said Writ, and I hereby make return that the cause of his detention by me is as follows:

Upon the 8th day of June, 1905, one John D. McKean, then and there a Justice of the Court of Special Sessions of the City of New York for the First Division, sat as a Magistrate in the County of New York and one Charles D. Maury came before him and made a certain deposition, a copy of which is hereto annexed and
15 marked "Exhibit A," and is intended to be taken as a part of this return. That thereupon the said John D. McKean, acting as Magistrate aforesaid, issued a certain warrant of arrest, a copy of which is hereto annexed and marked "Exhibit B" and is intended to be taken as a part of this return. Thereafter and pursuant to said warrant of arrest, I proceeded to execute the same by placing the said Albert J. Hatch under arrest, as commanded by said warrant. Thereafter and upon the 8th day of June, 1905, the Writ of *Habeas Corpus* herein was served upon me; that a copy of the said Writ is hereto annexed and is marked "Exhibit C" and is intended to be taken as a part of this return.

I herewith produce the body of the said Albert J. Hatch referred to in said Writ, and I hereby make return that the cause of his detention by me is as hereinbefore set forth, and I further make return that I now produce the original warrant hereinbefore referred to, and that further than this there is no cause or reason for the detention of the said relator known to me.

Respectfully,

EDWARD J. REARDON,
Special Peace Officer of the City of New York.

EXHIBIT "A."

CITY AND COUNTY OF NEW YORK, *ss:*

Charles W. Maury, being duly sworn, deposes and says that he resides at Noroton, Connecticut and transacts business at his office No. 20 Broad Street in the Borough of Manhattan, City, County and State of New York; that he is over the age of twenty one years, and that he is a broker by occupation.

That on the 7th day of June, 1905, one Albert J. Hatch, who resides at Stamford Connecticut, sold to deponent in the Borough of Manhattan, City, County and State of New York, one hun-
16 dred shares of the common capital stock of the Southern Railway Company, a corporation organized under and by virtue of the laws of the State of Virginia, and owning and operating a system of railroads situated wholly without the State of New York, of the par value of One hundred dollars per share for the sum of Thirty dollars and seventy five cents per share in cash, that being the then market value of said shares, and one hundred shares of the common capital stock of the Chicago, Milwaukee and St. Paul Railroad Company, a corporation organized under the laws of the State of Wisconsin, and owning and operating a system of railroads situated wholly without the State of New York, of the par value of One hundred dollars per share, for the sum of One hundred and seventy two dollars per share, that being the then market value of said shares;

and that on said 7th day of June, 1905, in the Borough of Manhattan aforesaid, the said Albert J. Hatch, in pursuance of such sale and on the payment by me to him of the sum of Twenty thousand two hundred and seventy five dollars, the total purchase price of such shares, delivered to deponent two certificates of stock representing such shares issued by such companies respectively assigned in blank, without making and delivering to deponent any bill or memorandum of such sale whatsoever, and without affixing to any bill or memorandum thereof, or to any other paper, any stamp or stamps, and without paying any tax on making such sale and delivery, although requested by deponent so to do, in violation of the provisions of an Act of the Legislature of the State of New York, entitled "An Act to Amend the Tax Law by providing for a tax on transfers of stock," known as Chapter 241 of the Laws of 1903.

CHARLES W. MAURY.

Subscribed and sworn to before me this 8th day of June, 1905.

JOHN B. McKEAN,
Justice of the Court of Special Sessions of the City of New York for the First Division.

17 EXHIBIT B.

CITY AND COUNTY OF NEW YORK, *ss:*

In the name of the People of the State of New York, to the Sheriff of the County of New York, or to any Marshal or Policeman of the City of New York, or to any Peace Officer in the County of New York, Greeting:

Whereas, Complaint in writing, and upon oath, has been made before the undersigned, one of the Magistrates of the County of New York, by Charles W. Maury, of Noroton, State of Connecticut, that on the 7th day of June, 1905, at the City of New York, in the County of New York, one Albert J. Hatch did commit a misdemeanor to wit, a violation of Chapter 241 Laws of 1905, by the sale and delivery of certain shares of stock of certain railroad corporations without making any bill or memoranda of such sale or affixing any stamp or stamps to such a bill or memorandum or in any way paying the tax as required by said act.

Wherefore, the said Complainant has prayed that the said Defendant may be apprehended and bound to answer the said complaint.

These are, therefore, in the name of the People of the State of New York, to command you, the said Sheriff, Marshals and Policemen, and each and every of you, to apprehend the said Defendant and bring him forthwith before me, at the Building for Criminal Courts in the said City, or in case of my absence or inability to act, before the nearest or most accessible City Magistrate in this City, to answer the said charge, and to be dealt with according to law.

Dated at the County of New York, this 8th day of June, 1905.

JOHN B. McKEAN,
Justice of the Court of Special Sessions of the First Division of the City of New York.

18 EXHIBIT C.

The People of the State of New York, to Edward Reardon, a Peace Officer of the County of New York:

We command you that you have the body of Albert J. Hatch by you imprisoned and detained as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Albert J. Hatch is called or charged, before Hon. John Proctor Clarke a Justice of the Supreme Court of the State of New York at the County Court House, Borough of Manhattan, City of New York, in Special Term Part II, immediately after the receipt of this Writ, to do and receive what shall then and there be considered concerning the said Albert J. Hatch, and have you then and there this Writ.

Witness Hon. John Proctor Clarke, a Justice of the *the* Supreme Court of the State of New York at the Borough of Manhattan, City, County and State of New York, this eighth day of June in the year Nineteen hundred and five.

By the Court

THOS. L. HAMILTON, *Clerk.*

[Endorsement on back:]

The within writ is allowed this 8th day of June 1905.

JOHN PROCTOR CLARKE,
Justice Supreme Court.

19 *Answer to Return to Writ of Habeas Corpus.*

New York Supreme Court, County of New York.

PEOPLE OF THE STATE OF NEW YORK *ex Rel.* ALBERT J. HATCH,
against
EDWARD REARDON, a Peace Officer of the County of New York.

The answer of Albert J. Hatch to the return of the writ of *habeas corpus* heretofore issued herein made and filed by the above named Edward Reardon, a Peace Officer of the County of New York.

The said Albert J. Hatch denies that the warrant returned to the said Peace Officer is a valid warrant, and alleges that the said warrant is invalid, null and void for the reasons set forth in the petition of said Albert J. Hatch herein upon which said writ of *habeas corpus* was granted.

CARTER, LEDYARD & MILBURN,
Attorneys for Relator, Albert J. Hatch,
54 *Wall Street, Borough of Manhattan, New York City.*

20 CITY AND COUNTY OF NEW YORK, *ss:*

Albert J. Hatch, being duly sworn, says that he is the petitioner herein; that he has read the foregoing answer and believes it to be true.

ALBERT J. HATCH,

Subscribed and sworn to before me this 9th day of June, 1905.

JOHN VIMONT LYLE,
Notary Public, N. Y. Co.

Final Order Appealed From.

New York Supreme Court, County of New York.

PEOPLE OF THE STATE OF NEW YORK *ex Rel.* ALBERT J. HATCH,
against
EDWARD REARDON, a Peace Officer of the County of New York.

Upon reading and filing the petition herein of Albert J. Hatch, verified on the 8th day of June, 1905, the writ of *habeas corpus* granted thereon dated the same day, the return of said Peace Officer made pursuant to said writ dated on the same day, and the answer of said Albert J. Hatch to said return dated the same day;

And after hearing Mr. John G. Milburn, of counsel for the said Albert J. Hatch, and Mr. W. Travers Jerome, District Attorney for the County of New York, on behalf of said Edward Reardon, Peace Officer;

And it appearing thereby that said Albert J. Hatch, upon
21 whose petition the said writ of *habeas corpus* was issued, is lawfully detained by said Peace Officer of the County of New York, by virtue of the warrant or mandate of the Honorable John B. McKean a Justice of the Court of Special Sessions of the City of New York for the First Division, sitting as Magistrate, annexed to said return directing the arrest of said Albert J. Hatch for a violation of Chapter 241 Laws of 1905 by the sale and delivery by him of certain shares of stock of certain railroad corporations on the 7th day of June 1905 at the Borough of Manhattan, City of New York, without making any bill or memorandum of such sale, or affixing any stamp or stamps to such a bill or memorandum or in any way paying the tax as required by said act, and that said warrant is a legal and valid warrant, and that said Justice of the Court of Special Sessions of the City of New York for the First Division sitting as a Magistrate, had full jurisdiction and authority to issue said warrant;

It is ordered that the said writ of *habeas corpus* and all the proceedings in this matter be and the same hereby are dismissed; and that the said Albert J. Hatch be and he hereby is remanded to the custody of said Peace Officer.

Dated, June 8th, 1905.

JOHN PROCTOR CLARKE, *J. S. C.*

22 *Notice of Appeal.*

New York Supreme Court, County of New York.

PEOPLE OF THE STATE OF NEW YORK *ex Rel.* ALBERT J. HATCH,
against
EDWARD REARDON, a Peace Officer of the County of New York.

Please take notice that Albert J. Hatch, the relator in the above-entitled proceeding, appeals to the Appellate Division of the Supreme Court for the First Department, from the order entered and filed in the above-entitled proceeding in the office of the Clerk of the County of New York on the 8th day of June, 1905, dismissing the writ of *habeas corpus* herein, and from each and every part thereof.

Dated, New York, June 9, 1905.

CARTER, LEDYARD & MILBURN,
Attorneys for Relator, Albert J. Hatch,
54 *Wall Street, Borough of Manhattan, New York City.*

To Wm. Travers Jerome, Esq., District Attorney for the County of New York, and Attorney for Edward Reardon. Thos. L. Hamilton, Esq., Clerk of the County of New York. Edward Reardon, Esq., Peace Officer of the County of New York.

23 *Affidavit of No Opinion.*

New York Supreme Court, County of New York.

PEOPLE OF THE STATE OF NEW YORK *ex Rel.* ALBERT J. HATCH,
against
EDWARD REARDON, a Peace Officer of the County of New York.

Affidavit of No Opinion.

COUNTY OF NEW YORK, *ss:*

John G. Milburn, being duly sworn, says that he is a member of the firm of Carter, Ledyard & Milburn, attorneys for the above-named relator, and that no opinion was written on the occasion of the dismissal of the writ of *habeas corpus* in the above-entitled proceedings.

JOHN G. MILBURN.

Sworn to before me this 30th day of June, 1905.

JNO. VIMONT LYLE,
Notary Public, N. Y. Co.

24 *Stipulation Waiving Certification.*

It is hereby stipulated that the papers as hereinbefore printed, consist of true and correct copies of the notice of appeal, the order appealed from and all the papers upon which the Court below acted in making the order appealed from, and the whole thereof, now on file in the office of the Clerk of New York County.

Certification thereof, in pursuance of Section 1353 of the Code of Civil Procedure is hereby waived.

Dated New York, June 30th, 1905.

CARTER, LEDYARD & MILBURN,
Attorneys for Relator and Appellant.
WM. TRAVERS JEROME,
District Attorney and Attorney for Respondent.

25 *Order of Affirmance of Appellate Division, First Department.*

At a Term of the Appellate Division of the Supreme Court of the State of New York, in and for the First Department, held at the Court House thereof in the County of New York, on the 26th day of January, 1906.

Present—
Hon. Morgan J. O'Brien, P. J.
" George L. Ingraham,
" Chester W. McLaughlin,
" Frank C. Laughlin,
" James W. Houghton, JJ.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* ALBERT J. HATCH,
Relator-Appellant,
against
EDWARD REARDON, a Peace Officer of the County of New York,
Respondent.

The relator above named having appealed to the Appellate Division of the Supreme Court in and for the First Department from an order of the Supreme Court, Special Term, New York County, dismissing a writ of *habeas corpus* and remanding the relator into the custody of the respondent, entered in the office of the Clerk of said Court on the 8th day of June, 1905, and said appeal having duly come on to be heard, and after hearing John G. Milburn, Esquire, and John F. Dillon, Esquire, of counsel for the appellant, and William Travers Jerome, District Attorney of the County of New York, Howard S. Gans, Esquire, and E. Crosby Kindleberger, Deputy Assistant District Attorney, of counsel for the
26 respondent, and Julius M. Mayer, Attorney-General, and John R. Dos Passos, Esquire, of counsel for the People of the State of New York by leave of this Court, and due deliberation having been had thereon,

Now, upon motion of William Travers Jerome, District Attorney of the County of New York, it is hereby

Ordered, that the order appealed from as aforesaid be, and the same hereby is, in all respects affirmed.

Enter.

M. J. O'B., *J. S. C.*

Notice of Appeal to Court of Appeals.

Supreme Court, County of New York.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* ALBERT J. HATCH, Relator, Appellant,
against
EDWARD REARDON, a Peace Officer of the County of New York, Respondent.

Take notice that Albert J. Hatch, the relator in the above-entitled proceeding, appeals to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, in and for the First Department, dated in the caption thereof January 26th, 1906, and entered in the office of the Clerk of the
27 said Appellate Division of the Supreme Court on the 1st day of February, 1906, affirming the order of the Supreme Court, Special Term, New York County, dismissing a writ of *habeas corpus* and remanding the relator into the custody of the respondent, entered in the office of the Clerk of said Court on the 8th day of June, 1905, and from every part thereof.

Dated New York, February 6th, 1906.

CARTER, LEDYARD & MILBURN,
Attorneys for Appellant.

To Messrs. Peter J. Dooling, Clerk of the County of New York. Julius M. Mayer, Attorney-General. William Travers Jerome, District Attorney of the County of New York.

28 *Opinion of Appellate Division, First Department.*

Supreme Court, Appellate Division, First Department, January 1906.

Morgan J. O'Brien, P. J.,
George L. Ingraham,
Chester B. McLaughlin,
Frank C. Laughlin,
James W. Houghton, JJ.

No. 8211.

PEOPLE *ex Rel.* ALBERT J. HATCH, Appellant,
against
EDWARD REARDON, a Peace Officer of the County of New York, Respondent.

Appeal by relator from an order of the Special Term dismissing writ of *habeas corpus* and remanding him to the custody of the respondent.

The relator was arrested on the 8th day of June, 1905, on a warrant issued by a Justice of the Court of Special Sessions, First Division, of the City of New York, charging him with having committed a misdemeanor the day before by selling and delivering certain shares of the capital stock of certain railroad companies in the County of New York without making a bill or memorandum of the sale or affixing thereto a stamp or in any manner paying the tax required by the provisions of Article XV. of the Tax Law added by chapter 241 of the Laws of 1905. The information upon which the warrant was issued was filed by the purchaser of the stocks
29 who was a resident of Connecticut but had an office for the transaction of business in the Borough of Manhattan, New York. It showed that the relator also resided in the State of Connecticut; that on the 7th day of June, 1905, the relator sold and delivered to the complainant in said Borough of Manhattan a certificate, assigned in blank, of one hundred shares of the capital stock of the Southern Railway Company, a Virginia corporation owning and operating a railway wholly without the State of New York, of the par value of $100 per share at $30.75 per share, that being the market value thereof, and also a certificate, assigned in blank, of one hundred shares of the capital stock of the Chicago, Milwaukee and St. Paul Railroad Company, a Wisconsin corporation likewise owning and operating a railroad wholly without the State of New York, of the par value of $100 per share at $172 per share, that being the par value thereof, without making or delivering to the purchaser a bill or memorandum of sale or affixing any stamp or stamps and without paying any tax although requested so to do.

After the relator was arrested he sued out the writ of *habeas corpus* and demanded his discharge upon the ground that the provisions of said Article XV of the Tax Law are unconstitutional and void.

John G. Milburn (John F. Dillon with him on the Brief), for Relator.

William Travers Jerome (E. Crosby Kindleberger and Howard S. Gans with him on the Brief), District Attorney, for Respondent.

Julius F. Mayer, Attorney General (John R. Dos Passos with him on the Brief), by leave of the Court, for the State of New York.

30 LAUGHLIN, *J.*:

The instructive arguments and excellent briefs of the learned counsel on this appeal have enabled the Court to readily appreciate the present status of judicial decisions on the interesting questions presented and the points on which the validity of the Stock Transfer Stamp Tax Law, so called, hinges. The validity of the amendment to the Tax Law is challenged upon the ground, among others, that the bill had only been upon the desks of the members of Assembly one day prior to its passage in that body. This objection should be considered first, because, if the constitutional requirements for the enactment of statutory law have not been observed, it is needless to enquire whether it would be competent for the Legislature to enact such legislation and the discussion of the question would be *obiter*. The bill as printed in the session laws shows that it was duly enacted. The original certificates annexed to the act, and on file with the Secretary of State are not presented by the record. It is not contended that they are not in due form to show the proper enactment of the law. It is contended that the journals may not be consulted to impeach the law. I am of opinion, however, that they do not impeach it; and I prefer to put the decision upon that ground without deciding whether if they did, they would be competent for that purpose.

Section 15 of Article III. of the State Constitution provides that "No bill shall be passed or become a law unless it shall have been printed and upon the desk- of the members in its final form, at least three calendar legislative days prior to its final passage, unless the Governor, or the Acting Governor, shall have certified to the necessity of its immediate passage, under his hand and the seal of the state; nor shall any bill be passed or become a law, except by the assent of a majority of the members elected to each branch of the Legislature; and upon the last reading of a bill, no amendment thereof shall be allowed, and the question upon its final passage shall
31 be taken immediately thereafter, and the yeas and nays entered on the journal." The provision requiring that the printed bill in the form in which it is to be enacted shall be upon the desks of the members three calendar legislative days is new, having been first adopted in 1894. The petition upon which the writ was granted shows that this bill originated in the Senate and had been printed and upon the desks of the members of that body in its final form the requisite time before its passage, which was on the 3d day of April, 1905; that on the next day it was duly sent

to the Assembly for concurrence and had its first reading in that body on that day and was duly referred to the Assembly Committee on Taxation and Retrenchment, which committee reported the same day in favor of its passage without amendment; that this report was thereupon agreed to and the bill was placed upon the order of second reading and had its second and third readings and passed on the 5th day of April by the requisite vote and in the presence of the quorum required by the Constitution; that pursuant to a practice adopted by the Senate and Assembly, without the enactment of a statute or rule requiring it, with a view to complying with the requirements of said Section 15 of Article III. of the Constitution, a bill originating in one house was printed and placed on the desk of each member of the other and every amendment made thereto as printed and placed upon the desks of the members of the house in which the bill originated, was likewise printed and placed upon the desk of each member of the other house; that pursuant to this practice the bill in question had been printed and upon the desk of each member of the assembly in the final form in which it was passed for more than three days. This was clearly a literal compliance with the constitutional requirements; and I am of opinion that it was a compliance with the spirit and intent thereof. The abuses that led to the adoption of this provision of the Constitution are well known. In committee and on the final passage of bills important amendments for ulterior purposes were sometimes surreptitiously made in writing or typewriting, and often allowed
32 in that form without being thoroughly understood; and thus bills were passed not only without being understood, but without either publicity or deliberation. Under the practice adopted by the Legislature for the purpose of complying with the Constitution none of the former abuses can be revived. When this bill came over from the Senate, every member of the Assembly had notice that it was the bill that was printed and upon his desk, and had been in the form in which it was passed by the Senate for the requisite time. This had given him ample opportunity to become familiar with the bill and no deception could be practiced upon him or upon his constituents. The publicity by its pendency in the Senate and remaining there in its final form three days before its passage, was all the notice to the constituents of members designed to be given. The debates in the Constitutional Convention indicate that this was the view of Senator Vedder, an experienced legislator and the author of this provision, as shown by the following colloquy between delegate Foote and himself immediately before the adoption of the amendment: "Mr. FOOTE: Mr. President, I desire to enquire of the chairman of the committee on legislative powers and duties, whether his understanding of this amendment is that the bill must have been printed and upon the desks of the members in each of the Houses three days before its passage in each House, or whether the provision means that three days before the final passage in the last House it must have been printed and upon the desks of all the members of the other house?"

"Mr. VEDDER: Mr. President, the question of the gentleman suggests that he may not be accustomed to the rules of legislative bodies. When a Senate bill is printed it is put upon the ...ate files of the Assembly, precisely the same as it is in the Sena... and *vice versa*. This means that it must be upon the desks of th... members of the House which votes upon it three legislative days before that House votes upon it, so that they may read it and understand it.
33 That is the object of the amendment. From necessity, it is also in the other House at the same time, because they always go together." (Revised Records Cons. Conv., 1894, Vol. I., p. 916.) The learned counsel for appellant do not contend that the bill should have been reprinted after coming over to the Assembly. They concede that the printing was sufficient, but they maintain that three days must in every instance elapse after the particular body has obtained jurisdiction of the bill either by its having been introduced in its own body, if the question be upon the passage of its own bill, three or more days before, or by its having been sent over from the other body three or more days before final passage. There is room for this contention and force in the arguments persuasively presented; and yet to so hold would probably invalidate a large part of the legislation enacted during the last eleven years. I think the Constitution is susceptible of the construction that has been placed upon it by the Senate and Assembly. The abuses at which the provision was aimed cannot arise under the practice in vogue; and I think it should not be overthrown by the Courts. It is well known that the members of each legislative body keep advised concerning the important measures pending in the other, its members often attending the hearings before the committees of the other house. After a bill like this has first received careful consideration by one body with public hearings of interested parties before its committee and is then duly passed and has been in the final form of its passage printed and upon the desks of the members of the other body for three days or more, no harm can come from permitting it to be put upon final passage as soon as a majority so directs. Often the members of one body are watching the hearings upon bills pending in the other and ready to vote as soon as the bill comes over; and it not infrequently happens that the early enactment of a bill after passing one body is required for the public interests. If this had been an Assembly bill and on the desks of the members the length of time it was, conceded by that body
34 could have legally passed it at the time it passed the Senate bill. If so, why was it not competent for it to adopt the Senate bill? Frequently the same bill is introduced in each house and is ready for final passage about the same time. The arguments of the learned counsel for the appellant lead logically to the position that in such case, although the bills are the same and each house is ready to pass its own, it cannot, until the lapse of three days, concur in the one which originated in and passed the other body. To require a certificate of the Governor or Acting Governor in such cases would not compel further deliberation; and would only

add another cumbersome and technical requirement, upon the due compliance with which would depend the validity of the law. Having, for these reasons, reached the conclusion that the procedure was sufficiently regular to validate the bill, provided it was competent for the Legislature to enact it, it becomes necessary to examine its provisions in the light of the objections to their constitutionality.

Article XV added to the Tax Law by the amendment contains ten sections, 315 to 324 inclusive. Section 315, so far as material to a decision of the questions presented, imposes a tax "on all sales, or agreements to sell, or memorandum of sales or deliveries or transfers of shares or certificates of stock in any domestic or foreign association, company or corporation, made after the first day of June, 1905, whether made upon or shown by the books of the association, company or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money or the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents. It is not intended by this act to impose a tax upon an agreement evidencing the deposit of stock certificates as collateral security for money loaned thereon which stock certificates are not actually sold, nor upon such stock certificates so deposited." The section then prescribes how the payment of the tax shall be denoted; and with respect to sales of certificates assigned in blank and delivered, as these were, it provides that the seller shall make and deliver to the buyer a memorandum or bill of sale, showing the date and amount of the sale and the name of the seller, to which an adhesive stamp or stamps prescribed in the act shall be affixed showing the payment of the tax. Sections 316 and 319 authorize and require the Comptroller of the State to prepare the stamps and put them on sale at convenient places. Section 317 provides in substance that a person who shall make a sale without paying the tax, or who shall deliver any stock or evidence of the sale thereof without affixing the stamps as required by the State shall be guilty of a misdemeanor and upon conviction thereof shall pay a fine of not less than $500 nor more than $1,000, or be imprisoned for not more than six months or shall be subjected to "both such fine and imprisonment at the discretion of the Court." Section 322 prescribes an additional civil penalty to the State of $500 for each violation of the Act to be collected by the Comptroller. Section 318 requires the seller to cancel the stamps as therein prescribed and makes a failure to comply therewith a misdemeanor. Section 320 makes an illegal use or interference with the stamps a misdemeanor. Section 321 confers authority upon the Comptroller to inquire into the payment of such tax and to enforce payment thereof by action. Section 323 provides, in substance, that no transfer of stock in violation of the provisions of the article "shall be made the basis of any action or legal proceeding, nor shall proof thereof be offered or received in evidence in any court in this state." Section 324 provides that these taxes when collected by the Comptroller shall be paid "into the State

treasury and be applicable to the general fund, and to the payment of all claims and demands which are a lawful charge thereon"

The provisions of the amendment to the Tax Law clearly
36 show that the stamp tax on the transfer of stocks was intended as a substantial source of general revenue, The language employed embraces every actual sale and delivery of stock anywhere within the State. Yet it is well known that the sale of such securities elsewhere than on the exchanges or on the "curb" is only a very small percentage. The extent of the transactions in stocks on the exchange is a matter of record; and the legislators could estimate approximately the revenue that might be derived from this stamp tax. It is a matter of current history that it was expected that about $5,000,000 per annum would flow into the State treasury from the imposition of the tax and that the amount of such taxes thus far collected indicates that the total for the year will approximate the amount anticipated.

In approaching the momentous questions presented, it must be borne in mind that the power of taxation is an essential attribute of government, that, subject to constitutional restraints, it is for the Legislature, representing the people, to determine the subjects and objects of taxation; that the Legislature is vested with all the power reserved to the people and, except as it may be expressly or impliedly restrained by the State or Federal Constitution, has unlimited power in the premises. Judges, therefore, may neither substitute their own judgment for that of the Legislature as to the wisdom or justice of a particular law, nor be influenced by those or like considerations in deciding its constitutionality. The sole enquiry is, therefore, has the Legislature exceeded its jurisdiction and enacted a tax measure in contravention of the State or National Constitution? The presumption is in favor of the validity of the statute and we may not declare it void unless beyond a reasonable doubt it has been enacted in violation of a controlling constitutional provision. There is no express limitation in our State Constitution on the taxing power of the Legislature. Section 15 of Article III prescribes the vote essential to the passage of a bill; and Section 25 of the same article prescribes that the presence of three-fifths
37 of all the members elected to each house shall be essential to constitute a quorum for the passage of bills, among others, imposing a tax. These provisions were complied with. The only provision of the State Constitution relied on by the relator is Section 6 of Article I, which provides that "No person * * * shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation." The appellant also relies on the 14th Article of amendment to the Federal Constitution, which provides, among other things, that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection — the laws." This provision was undoubtedly designed to restrain legislation by the State and

not by Congress; but a similar provision, excepting the clause with respect to the equal protection of the laws, is contained in the Fifth Article of amendment as a restraint upon the legislative power of Congress. This law does not deprive people within the State of New York of equal protection of the laws. It operates on all who sell stock in any part of the State alike regardless of creed, color or nativity; and the amount of the tax depends upon the magnitude of the transaction. It is imposed on the transfers of a distinct class of property most extensively bought and sold on the exchanges. It does not, therefore, I think deny to any person within the State the equal protection of the laws; and is not within the prohibition of the clause of the Federal Constitution relating to equal protection of laws. It cannot be successfully maintained that the Federal Government has any greater power of taxation, except with respect to imports which the States are prohibited from taxing (Article I., §§ 8, 9, 10, U. S. Con.), than the State. It was never intended that Congress should have power to enact a tax measure depriving any person of the equal protection of the laws in the sense
38 in which the States are inhibited from making laws depriving him of such protection. It follows, therefore, I think, logically that if Congress could impose such a tax, the state may likewise. This tax measure follows in all material respects Section 6 of the United States Revenue Tax Law of 1898, and was doubtless founded thereon. In United States *v.* Thomas (115 Fed. Rep., 207; affd. 192 U. S., 363), all of the objections now urged against the State law, at least, with the exception of the equal protection clause of the 14th Amendment, appear to have been presented against the validity of the Federal law, and they were fully and ably answered, and it was sustained as a tax, *not upon property, but upon the transfer* of this particular species of property. If it was competent for Congress to enact that law, it was competent for the Legislature of New York to enact this statute.

It may be that under the decisions of our own Courts as a tax on *property* this statute could not be sustained, owing to the fact that it is not based on value, and that no opportunity is afforded the person upon whom the tax is imposed for a hearing on the valuation of his property or the amount of the tax, objections forcibly presented by Mr. Justice Ingraham, I disagree with him, however, as to the nature of this tax. The learned Attorney-General and his associate do not seek to sustain the law as a tax upon property. They contend that it is an excise tax or stamp duty upon the transaction or transfer of certificates of stock, the amount of the tax depending upon the extent of the business; and such literally it appears to be.

It has so long been the practice in this State to tax property only that the validity of any legislation departing from that practice is vigorously contested. The fact that the power has not been heretofore exercised is no evidence that it does not exist. Of late years the Legislature has imposed a tax in certain instances on the transfer of property by will and under the intestacy laws; and its authority in this regard has been sustained both by the State and Federal

Courts, although the tax was not imposed on all such trans-
39 fers and varied with the valuation of the property transferred.

The Legislature has also inaugurated a policy of taxing special franchises, a species of intangible property not theretofore reached under the tax laws. The validity of these laws has also been sustained by the Court of Appeals and by the Supreme Court of the United States. From these two sources and from the liquor tax most of the revenues essential to maintain the State are now derived. Our Courts and the Federal Courts have frequently given expression to the view that it is competent for the Legislature to single out any species of property or business or the transfer of property as the object of taxation (People *v.* Home Ins. Co., 92 N. Y., 337; Matter of McPherson, 104 N. Y., 317; Matter of Whiting, 150 N. Y., 29; Cook *v.* Marshall, 196 U. S., 261; Matter of Gould, 156 N. Y., 427; Magoun *vs.* Illinois Trust & Savings Bank, 170 U. S., 293; Nicol *vs.* Ames, 173 U. S., 509.) The contention of the relator, carried to its logical effect, would confine the Legislature in exercising the power of taxation to an ad valorem tax on *all* personal property or *all* real property, or both. It is not so confined by any constitutional provision or by the decisions of the Courts rendered heretofore. There are doubtless implied limitations on the exercise of this taxing power. If the Legislature should capriciously single out a particular species of property or even the transfer thereof for taxation without any reasonable ground for the classification or hostile-y discriminate against particular persons or classes, and impose a tax thereon which would practically constitute confiscation, or be oppressive, the legislation might be declared void (Matter of Pell, 171 N. Y., 48; People *vs.* Eq. Trust Co., 96 N. Y., 387; Connolly *vs.* Union Sewer Pipe Co., 184 U. S., 540; Nichols *vs.* Ames, *supra).* The statute under consideration, however, cannot fairly be condemned on this ground. It is uniform, it is moderate, and the transaction singled out embrace in the value of the property and the number of transfers by far the most important sales of
property within the State. The measure is practicable of
40 enforcement, and will produce a great revenue without being overburdensome on the sellers or oppressive. The classification is not arbitrary. The property upon the transfer of which the tax is levied is the product of legislation. It stands out by itself as a distinct class of property. Whether under the reserved power to alter, amend and repeal charters of corporations the Legislature could impose this tax on the transfer of stock of domestic corporations theretofore incorporated need not be decided; but it is very clear that as to new corporations it could impose it even thought it could not on the transfer of notes, bonds and mortgages of individuals. Since the Legislature determined to inaugurate the policy which clearly it was competent for it to inaugurate as to some property of the class, is it not not equitable that the transfer of stock in foreign corporations on the exchanges in this State should be put on a par with stock in a domestic corporation? The decisions holding that the right *to sell* is an essential attribute of property are not

in point. This statute merely regulates and taxes, but does not prohibit the sale. The right *to hold* property is also an essential attribute of ownership, and yet it is subject to the power of taxation under which the State may take the property if the tax be not paid.

The statute is not in conflict with the commerce clause of the Federal Constitution (Article I., § 8). The tax is imposed only on transfers made *within this State,* and it operates alike on transfers made by residents and by non-residents without discrimination (Woodruff *vs.* Parham, 8 Wall., 140; King *vs.* Mullins, 171 U. S., 436).

What has been said disposes of the contention that the act in imposing a tax on sales of the shares of a foreign corporation owned by a non-resident, taxes property without the jurisdiction of the State. The sale and delivery within the State confer jurisdiction to impose the tax on the *transfer.*

It follows that the order should be affirmed.

O'Brien, P. J., McLaughlin and Houghton, JJ., concur.

41 *Dissenting Opinion of Ingraham, J.*

Supreme Court, Appellate Division—First Department, January, 1906.

Morgan J. O'Brien, P. J.
George L. Ingraham,
Chester B. McLaughlin,
Frank C. Laughlin,
James W. Houghton, JJ.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* ALBERT J. HATCH, Appellant,

vs.

EDWARD REARDON, a Peace Officer of the County of New York, Respondent.

No. 8211.

Appeal from final order dismissing writ of *habeas corpus.*

John F. Dillon and John G. Milburn, for appellant.

W. T. Jerome, District Attorney, and E. Crosby Kindleberger, Deputy Assistant District Attorney, for respondent.

Julius M. Mayer, Attorney-General, and John R. Dos Passos, for the People, Respondent.

INGRAHAM, *J.:*

The question presented on this appeal is as to the constitutionality of the act imposing a tax on the sale of stock, being an amendment to the Tax Law (Chapter 908 of the Laws of 1896), Chapter
42 241 of the Laws of 1905. Section 315 of the Tax Law, as amended, provides: "There is hereby imposed and there

shall immediately accrue and be collected a tax as herein provided, on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any domestic or foreign association, company or corporation, made after the first day of June, nineteen hundred and five, * * * on each hundred dollars of face value or fraction thereof, two cents."

This tax now under consideration is imposed upon the sale of a specific kind of personal property, namely, the shares of stock in an incorporated company. The seller of stock must pay to the State a sum of money upon the sale of or agreement to sell the stock, and thus the right to sell is made subject to the payment to the State of the tax imposed upon that sale. The free and unrestricted right to sell property is clearly recognized in this State as an attribute of the property itself which cannot be separated from it (Wright *v.* Hart, 182 N. Y., 330). In that case the Court of Appeals quote with approval from the opinion in Wynhamer *v.* The People (13 N. Y., 378), as follows: "The right to use, buy and sell property is protected by the Constitution, and when the law annihilates the value of property, and strips it of its attributes by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the constitutional provision intended expressly to shield personal rights from the exercise of arbitrary power." See also People *ex rel.* Manhattan Sav. Inst'n. *v.* Otis (90 N. Y., 48), where it is said: "Depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision."

In considering the validity of this tax, we must, I think, keep this proposition clearly in mind, that a tax is imposed upon an essential attribute of property, to be paid by anyone who sells or agrees to sell it, and a failure to pay that tax is made a criminal of-
43 fense punishable by fine or imprisonment. The tax is based upon a percentage of the property taxed. The statute imposes a tax on all sales or agreements to sell, or deliveries or transfers of shares or stock or certificates of stock on each one hundred dollars of the face value or fraction thereof two cents. The tax is not a specific tax of so much on the sale of each share of stock, but a tax of two cents on each one hundred dollars of face value of the stock sold; and thus, the amount of the tax is fixed by a percentage of the face value of the stock that is sold. This is not a tax in the nature of a license to carry on a particular trade or occupation. Brokers who buy and sell stock are not required to obtain a license or to pay a tax for the privilege of engaging in the business of purchasing and selling stocks. It applies to all persons whether the owner or broker who sells or delivers shares of stock. The statute provides that "any person or persons who shall make any sale, without paying the tax of this article imposed, or who shall in pursuance of any sale deliver any stock, or evidence of the sale of any stock or bill or memorandum thereof, without having the stamps provided for in this article affixed thereto, shall be deemed guilty of a misdemeanor." Whoever, therefore, makes a sale of or an agreement to sell stock, whether belonging to himself or to another, or delivers any stock in pursu-

ance of a contract of sale, must pay the tax or be subject to the penalty prescribed. The question to be considered is one of the power of the legislature to impose such a tax; and in considering that question we must bear in mind the principle firmly established in this State that the constitutional validity of the law is to be tested, not by what has been done under it, but what may under its authority be done (Stuart *v.* Palmer, 74 N. Y., 183). If a tax of two cents upon each $100 of the face value upon the sale of each share of stock can be imposed, a tax of ten dollars upon each $100 of the face value of each share can be imposed which would, in effect, confiscate all shares of stock which were of the market value of ten dol-
44 lars per share or less. If this tax is upheld I do not see why the Legislature could not impose a tax on the sale of wheat or any other commodity, fixing an arbitrary value upon the property to be taxed, or select any other specie of property and tax a sale or delivery of it, the tax to be based upon a value, or assumed value, to be fixed by the Legislature. I should have no doubt about the power of the Legislature to impose a tax upon the sale of all personal property, all real property, or upon all property of a particular class, basing that tax upon the value of the property, or the amount at which it was actually sold; but the tax here sought to be enforced is, as I view it, of a very different character. Shares of stock of incorporated companies are selected, and upon a sale of such stock there is imposed a tax, not based upon the value of the property or the amount for which it was actually sold, but upon what is called the face value of the stock, a value which rarely if ever, represents its true selling value. Consideration of the principles which the Court of Appeals have applied where the question of the constitutional power of the Legislature in relation to taxation has been discussed has satisfied me that this tax cannot be sustained without a violation of the constitutional provision that no person shall be deprived of his life, liberty or property without due process of law (Constitution, Article 3, § 6). On considering the cases, we must bear in mind that this is a tax of two cents upon each hundred dollars of face value of the stock or fraction thereof.

In Stuart *v.* Palmer (74 N. Y., 183) an act had been passed by the Legislature to lay out, open and grade Atlantic avenue in Kings County. It provided for two assessments, one for damages awarded to the owner of the land, and another for the expenses of regulating grading, etc. The former assessment was to be made and confirmed after proper notice to and hearing of the persons interested. The latter assessment could be made without any notice to or hearing of any person. Judge Earl, delivering the opinion of the Court,
45 says: "I am of opinion that the Constitution sanctions no law imposing such an assessment, without a notice to and a hearing or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. * * * The constitutional validity of law is to be tested, not by what has been done under it,

but by what may, by its authority, be done. The Legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice. * * * A tax or assessment upon property arbitrarily imposed, without reference to some system of just apportionment could not be upheld. * * * What one pays for taxes and assessments is taken for the public good and can be justified upon no other theory. Private property cannot be taken for private purposes, even under the legislative power of taxation. Taxation and assessment imply apportionment. Each person must share the burdens of taxation and assessment equally with all others in like situation. * * * The Legislature can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these 'without due process of law' has its foundation in this rule. * * * 'Due process of law' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative or executive in its nature." And the learned Judge then calls attention to a large number of cases which upheld the contention that where a tax is based upon the value of property, before such a tax can be imposed, the
46 owner of the property or the person liable for the tax is entitled to notice so that he can be heard before the tax is imposed.

The same question was presented in Remsen *vs.* Wheeler (105 N. Y., 573). In that case an assessment for water rates upon a vacant lot in the City of Brooklyn made under the act in reference to the supply of said city with water where no notice was given to the owner of the levying of the assessment, or opportunity for him to be heard, was held to be illegal and void. The act in that case provided that the water board should, in every year, by resolution, fix the price which should be assessed upon every vacant lot situated upon any street, lane, alley or court through or into which distributing pipes had been laid until the bonds issued for the construction of said works, with the interest thereon, should have been paid; and that sum so assessed, together with percentage of defaults, should be a lien upon the said premises respectively, and in determining this case, the Court say: "The lots of the plaintiffs were vacant, and hence were assessed and assessable for water rates under this section. As no use of the water could be made upon vacant lots, it must have been intended that whatever assessment was made upon them under this section was to be apportioned according to the value of the lots, or the benefits of them, or the cost of bringing the water to them, respectively. It cannot be supposed that it was the legislative intent or the practical operation of the section that a vacant lot worth $1,000 should be assessed for water rates as much as one worth $100,000. Unless this section requires

the assessment for water rates upon vacant lots to be imposed and apportioned according to value, benefits or costs, it could not be justified as a scheme of taxation, and would be obnoxious to constitutional objections. Therefore, in reference to the imposition of these assessments, as in reference to the imposition of other assessments and taxes, the lot owners were entitled at some stage of the proceeding to a notice and an opportunity to be heard; and
47 unless the law gave them the right to notice and an opportunity to be heard before the board which was authorized to impose the assessment, it was unconstitutional and void for the reason stated in Stuart *v.* Palmer (74 N. Y., 183);" and although there was a dissenting opinion in that case, this proposition was not disputed, Judge Finch, in his dissenting opinion, stating: "Section 24 authorizes them 'to fix the price which shall be assessed' 'upon every vacant lot situated upon any street, lane, alley or court through or into which distributing pipes shall have been laid,' and makes the 'sums so assessed' and the 'percentages for default' a lien upon the lands and to be enforced like other assessments. No notice to any one and no opportunity to be heard is given by the act, and it is wholly immaterial whether the water is used or not, and the plaintiffs contend that for such defect the act is unconstitutional and the water rates absolutely void. These water rates, at least as to vacant property, are called assessments and are in their nature such, and it is difficult, if not impossible, to see how they can be sustained.

In Nehasane Park Association *vs.* Lloyd (167 N. Y., 431) the question of the constitutionality of an act authorizing the commissioners to levy a tax of fifteen cents on each one hundred acres of the land described in the County of Lewis and ten cents on each one hundred acres of the land described in the counties of Hamilton and Herkimer, was discussed, the Court saying: "The legislature thus created a special tax district and then provided that all lands within that district should be taxed at a specified sum per acre, without any regard to the value of the lands, or the benefits to be derived from the improvement. The statute did not give to the land-owner a hearing or an opportunity to be heard in regard to the apportionment of the tax. It was a uniform burden fixed by the Legislature itself upon all lands within the district irrespective of their value, or their relation to the proposed improvement, or any special benefit to be derived from the construction of the
48 road. We are not prepared to say that the statute was a valid exercise of power under the Constitution. It has been generally understood that a fixed and arbitrary sum, assessed by statute upon property and imposed without reference to some system of just and equitable apportionment, and without any opportunity to the owner to be heard, cannot be upheld" (Citing Stuart *v.* Palmer, 74 N. Y., 183; McLaughlin *v.* Miller, 124 N. Y., 510; Remsen *v.* Wheeler, 105 N. Y., 573; Spencer *v.* Merchant, 125 U. S., 345; Norwood *v.* Baker, 172 U.S., 269; Jones *v.* Town of Tonawanda, 158 N. Y., 438; Cooley on Taxation, 243, 244).

In discussing the constitutionality of the original Collateral Inheritance Tax, which imposed a tax of five dollars on every hundred

dollars of the clear market value of the property transferred, Judge Earl, delivering the opinion of the Court in Matter of McPherson (104 N. Y., 306), says: "The power of the legislature over the subject of taxation, except as limited by constitutional restrictions, is unbounded. It is for that body, in the exercise of its discretion, to select the objects of taxation. It may impose all the taxes upon lands, or all upon personal property, or all upon houses or upon incomes. It may raise revenue by capitation taxes, by special taxes upon carriages, horses, servants, dogs, franchises and upon every species of property and upon all kinds of business and trades. * * * It is not very important to determine in this case whether the act of 1885 is to be regarded as imposing a tax upon property or upon the succession or devolution of property by will or intestacy. In either case it is a special tax. In the one case it is a tax upon the particular class of property, and in the other case a tax upon the succession or devolution of property, or the right to receive property in the cases mentioned in the statute. Whether it be one or the other it is free from constitutional objection. It has never been questioned that the Legislature can impose a tax upon all sales of property, upon all incomes, upon all acquisitions of property,
49 upon all business and upon all transfers. * * * If this be regarded as a tax upon property, then it is free from constitutional objection if it be equally imposed and properly apportioned upon all the property of the class to which it belongs. * * * A tax imposed for the general welfare upon a particular house, or the houses of a particular neighborhood, would be amenable to constitutional objection, but if imposed upon all the houses in the State, then it is a tax imposed upon all the property of that class, and is amenable to no objection. * * * The tax is imposed according to the value of the legacy and collateral inheritance liable to be taxed, and hence there must be some mode of ascertaining that value; and for that purpose judicial action is requisite at some stage of the proceeding before the liability of the tax payer becomes finally fixed. He must have some kind of notice of the proceeding against him, and a hearing or an opportunity to be heard in reference to the value of his property, and the amount of the tax which is thus to be imposed. Unless he has these, his constitutional right to due process of law has been invaded."

The case of Bell's Gap Railroad Company *v.* Pennsylvania (132 U. S., 232), presented a question as to whether an assessment of a tax of three mills upon the nominal or face value of bonds issued by a corporation, instead of assessing it upon the actual value of the bonds was valid. It was held that "this might have been subject to question under the state laws; but the state courts have upheld the assessment as valid. We are to accept it, therefore, as part of the State system of taxation, authorized by its constitution and laws." In determining that the tax did not violate any provision of the Constitution of the United States, it was said: "We do not perceive that the assessment in question transgresses this provision. There is no unjust discrimination against any persons or corporations. The presumption is that corporate securities are worth their face value;" and in speaking of the power of the state to adjust its system of taxa-

tion, it was said, "It may, if it chooses, exempt certain classes
50 of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their constitution." This case has no relation to the construction that the courts of this State have given to the provisions of the State Constitution; and it seems there to have been based upon a presumption that a bond or other obligation for the payment of money by a solvent debtor is presumably worth the face value of the obligation—a presumption which certainly does not apply to shares of stock which, although having what is called face value, are not obligations to pay a sum of money but which simply represents an undivided interest in the assets of the corporation after payment of its debts. Those assets may greatly exceed the face value of all its capital stock, or their value may be much less than this face value. There is certainly no presumption that a stock is worth more or less than the face value.

Assuming that the Legislature would have the power to impose a tax upon the sale of stock based upon the value of the stock or the amount for which the stock was actually sold, I think it is within the prohibition of the Constitution for the Legislature to impose a tax not upon the value of the property sold; not upon the price at which the property was sold, but upon an amount which the Legislature should fix as the value of the property sold, and, as I view it, this is just what this statute under consideration does. It fixes the face value of the stock as a basis upon which a tax is imposed
51 and requires the payment upon each sale of the stock of a percentage of that face value.

The Attorney-General in his brief states that "This act is really an extension of the present Transfer Tax laws of New York. * * * Sales and transfers of stock, even though they occur every day, are in nowise different from transfers occurring by deed or will, to take effect at death. Both are different methods of alienation. If, therefore, the Legislature has constitutional power to fasten a tax or impost upon transfers by will, particularly when tney are not gratuitous, it would seem beyond question that they have equal power to fasten tax upon transfers during life by sale of stock." Assuming that this is a correct statement and the constitutionality of this act is to be determined by the application of the rules which were applied in determining the constitutionality of the Transfer Tax, it seems to me that under the decision of the Court of Appeals in Matter of McPherson (*supra*), this tax cannot be sustained for the reason, as before stated, that the amount of the tax is not fixed upon the actual value of the property sold or the amount for which it was sold, but upon an arbitrary valuation fixed by the Legislature, the tax imposed

being a percentage of the face value of the stock and not of its actual value. In the McPherson case it was expressly held that the Transfer Tax could not be upheld unless it provided for a notice to the taxpayer and gave him an opportunity to be heard in relation to the value of the property upon which the tax was imposed before the impostion of the tax. It would seem to follow, therefore, that if that act had imposed a tax upon the face value of every share of stock which passed by will or the intestate laws, regardless of its actual value, it would have been void. If the Legislature could impose a tax based upon a percentage of the face value of the shares of stock, I can see no reason why it could not value each share of stock sold at
$100 a share and impose a tax of a percentage of the value of
52 the stock thus arbitrarily fixed. Under the authorities before cited the Legislature could not without providing for a notice to or a hearing of the owner of a piece of real property impose on each piece of real property a fixed tax, or arbitrarily fix the value of each piece of property at a certain amount and require the payment of a percentage of that value as a tax upon the property. Nor could the Legislature upon a sale of property require the owner thereof to pay a percentage of the value of the property fixed by the Legislature, but which is not based in some way upon its actual value.

There are many shares of stock of a face value of one hundred dollars each which do not sell for $10. The tax upon such a share would be two cents on ten dollars. There are stocks of the face value of $100 per share which sell for over four thousand dollars per share. Upon the sale of a share of that stock, the tax would be two cents on four thousand dollars, certainly an inequality in the tax which is unparalled in any system of taxation of which I have ever heard. If the Legislature could impose a tax of two cents upon each $100 of the face value of every share of stock sold, it could impose a tax of ten dollars upon each $100 of the face value of every share of stock sold, and thus confiscate all stock which did not sell for more than ten dollars per share.

We are not unmindful of the decision which involved the validity of the United States Revenue Tax of 1898, reported in 115th Federal Reporter, 207; affirmed by the Supreme Court of the United States in 192 U. S., 363. The discussion in that case depended entirely upon the right of Congress to impose a tax upon the sale of stock, a power which I have no doubt the Legislature of this State possesses. The question as to the method to be adopted in ascertaining the amount of such a tax was not discussed, and this particular question does not seem to have been presented in that case. The power of taxation given to Congress and the limitation of that power by the Federal Constitution present an entirely different question
than that presented by the limitation of the power of the
53 Legislature in regard to taxation by the Constitution of this State, and it is with the latter question that we have to deal in this case, and the construction given to the State Constitution by the Courts of this State is to control. As I view it, it is the method adopted by which the amount of the tax that is imposed is ascertained which violates the fundamental law of the State. For that reason the tax cannot be sustained.

Other questions are presented on this appeal which, in view of this conclusion, are not considered; but for the reasons stated the order appealed from should be reversed and the relator discharged.

Waiver of Certification.

It is hereby stipulated, pursuant to Section 3301 of the Code of Civil Procedure, that the foregoing are true and correct copies of the order of affirmance by the Appellate Division of the Supreme Court, First Department; the papers upon which the order was founded; the notice of appeal to the Court of Appeals from such order of affirmance; and the opinions rendered by Justices Laughlin and Ingraham of said Appellate Division of the Supreme Court; and that certification of the same, pursuant to Section 1315 of the Code of Procedure, or otherwise is hereby waived.

Dated New York, February 9th, 1906.

CARTER, LEDYARD & MILBURN,
Attorneys for Appellant.

WILLIAM TRAVERS JEROME,
District Attorney of the County of New York,
Attorney for Respondent.

JULIUS M. MAYER,
Attorney General.

54 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 17th day of April, in the year of our Lord one thousand nine hundred and six, before the Judges of said Court.

Witness, The Hon. Edgar M. Cullen, Chief Judge, Presiding

W. H. SHANKLAND, *Clerk.*

Remittitur, April 18th, 1906.

THE PEOPLE, &c., *ex Rel.* ALBERT J. HATCH, Relator-Appellant,
against
EDWARD REARDON, a Peace Officer, &c., Respondent.

Be it remembered, That on the 16th day of February in the year of our Lord one thousand nine hundred and six, the relator, Albert J. Hatch, the appellant in this proceeding came here into the Court of Appeals, by Carter, Ledyard & Milburn, his attorneys, and filed in the said Court a notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Edward Reardon, a peace officer &c., the respondent in said proceeding afterwards appeared in said Court of Appeals by Julius M. Mayer, Attorney General and William Travers Jerome, District Attorney.

55 Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Messrs. John G. Milburn and John F. Dillon, of counsel for appellant, and by Messrs. Julius M. Mayer, Attorney General, John R. Des Passos and E. Crosby Kindleberger, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE, ALBANY, *April 18th*, 1906.

I Hereby Certify that the preceding record contains a correct transcript of the proceedings in said proceeding in the Court of Appeals, with the papers originally filed therein attached thereto.

[Seal of the Court of Appeals.]

W. H. SHANKLAND, *Clerk.*

56 At a Special Term, Part II of the New York Supreme Court in and for the County of New York, held at the County Court House, in the City of New York, Borough of Manhattan, on the 24th day of April, in the year of our Lord one thousand nine hundred and six.

Present: Hon. Joseph E. Newburger, Justice.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* ALBERT J. HATCH, Relator-Appellant.
against
EDWARD REARDON, a Peace Officer of the County of New York, Respondent.

Order on Remittitur.

Whereas, heretofore, to-wit: at a Special term Part II of the New York Supreme Court in and for the County of New York, held at the County Court House in the Borough of Manhattan of the said City, on the 8th day of June, 1905, the above named relator, Albert J. Hatch, duly filed his petition for the issuance of a writ of *habeas corpus*, directed to the above named respondent, in this Court, where-

upon, to wit, on the said 8th day of June, 1905, a writ of *habeas corpus* was duly issued out of and by the said Court and the same having duly come on to be heard, it was considered by this Court and ordered by the Hon. John Proctor Clarke, a Justice of said court, that said writ of *habeas corpus* and all proceedings in the matter be and they thereby were dismissed, and that the said Albert J. Hatch, be and he thereby was remanded to the custody of the said Peace Officer.

57 And whereas, the appellant aforesaid, thereafter duly appealed from the said order to the Appellate Division of the Supreme Court of the State of New York for the First Department.

And whereas, at a Term of the Appellate Division of the Supreme Court, held in and for the First Department, to wit: at the Court House thereof in the County of New York, on the 26th day of January in the year of our Lord one thousand nine hundred and six —the said order of this Court was by the order of the said Appellate Division in all things affirmed.

And whereas, the appellant, aforesaid thereafter duly appealed from the said order of the said Appellate Division to the Court of Appeals of the State of New York.

And whereas, at a term of the said Court of Appeals, held at the Capitol in the City of Albany, on the 17th day of April, in the year of our Lord one thousand nine hundred and six, the said order of the said Appellate Division was by the order of the said Court of Appeals in all things affirmed, and the record herein, and the proceedings in the said last-mentioned Court upon the said appeal, were by the said order remitted to this Court, there to be proceeded upon according to law, as by the remittitur of the said Court of Appeals now on file in this Court more fully appears.

Now, therefore, on reading and filing the said remittitur, and on motion of Wm. Travers Jerome, Esquire, District Attorney, it is

58 Ordered, that the said order of the said Court of Appeals be and the same hereby is made the order of this Court, and it is further

Ordered, that the said order of this Court so appealed from as aforesaid and so affirmed, and the said order of the Appellate Division of the Supreme Court herein, be and the same are hereby directed to be enforced and carried into execution and effect.

Enter.

J. E. N.
J. S. C.

59 [Endorsed:] New York Court of Appeals. The People of New York, *ex rel.* Albert J Hatch, against Appellant, Edward Reardon, A Peace Officer of the City of New York, Respondent. Order on Remittitur. Wm. Travers Jerome, District Attorney, Criminal Courts Building, Borough of Manhattan, New York City. Filed Apr. 24, 1906.

60 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the Honorable the Justices of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of New York, before you, or some of you, on a remittitur from the Court of Appeals of the State of New York, being the highest court of law or equity of the said State in which a decision could be had, in a proceeding between the People of the State of New York, *ex rel.* Albert J. Hatch, petitioner-appellant, and Edward Reardon, a Peace Officer of the County of New York, defendant-respondent, wherein was drawn in question the validity of a statute of and an authority exercised under said State on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said People of the State of New York, *ex rel.* Albert J. Hatch, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of May, in the year of our Lord one thousand nine hundred and six.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

61 [Endorsed:] A. B. United States Supreme Court. People of the State of New York, *ex rel.* Albert J. Hatch, Plaintiff in error, *against* Edward Reardon, a Peace Officer of the County of New York, Defendant in error. Writ of Error. Rec'd May 24, 1906. Peter J. Dooling, Cl'k.

62 Supreme Court of the United States.

PEOPLE OF THE STATE OF NEW YORK *ex Rel.* ALBERT J. HATCH,
Plaintiff in Error,
against
EDWARD REARDON, a Peace Officer of the County of New York,
Defendant in Error.

Petition for Writ of Error.

Now comes Albert J. Hatch, the above named relator, by Lewis Cass Ledyard, John G. Milburn and John F. Dillon, his attorneys, and says that on the 17th day of April A. D. 1906, the Court of Appeals of the State of New York, being the highest court of the said State in which a decision in this cause could be had, made and entered a final order and judgment herein in favor of Edward Reardon, a Peace Officer of the County of New York, the defendant in error above named, and against the People of the State of New York, *ex rel.* Albert J. Hatch, the plaintiff in error above named, affirming a final order of the Appellate Division of the Supreme Court of the State of New York, in and for the First Department, entered the 26th day of January, 1906, which affirmed a final order of the Supreme Court of the State of New York in and for the County of New York, entered the 8th day of June, 1905, dismissing a writ of *habeas corpus* herein, and remanding this petitioner to the custody of the defendant in error above named; and afterwards, and on the 24th day of April, A. D. 1906, the records and proceedings in said cause having been remitted to the Supreme Court of the State of New York in and for the County of New York, said final order and judgment of the Court of Appeals was made and entered as
63 the final order and judgment of the said Supreme Court, in which final order and judgment, and the proceedings had prior thereunto in this cause, certain manifest errors were committed to the prejudice of the said relator, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, your petitioner prays that a writ of error may issue in his behalf from the Supreme Court of the United States to the Supreme Court of the State of New York for the correction of the errors and the reversal of the final order and judgment so complained of; that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States; that said writ of error operate as a supersedeas; that the amount of security which the petitioner shall give and furnish on said writ of error may be fixed, and that upon the giving of such security all further proceedings in said Court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

Dated the 23rd day of May, 1906.

LEWIS CASS LEDYARD,
JOHN G. MILBURN,
JOHN F. DILLON,
Attorneys for Petitioner.

64 The writ of error as prayed for in the foregoing petition is hereby allowed to operate as a supersedeas, and the bond is fixed at the sum of One thousand dollars ($1,000).

Dated the 23d day of May, 1906.

R. W. PECKHAM,
Asso. Jus. Sup. C't U. S.

65 [Endorsed:] Supreme Court of the U. S. People of the State of New York *ex rel* Albert J. Hatch, Pl'ff in Error, against Edward Reardon, a Peace Officer of the County of New York, Def't in Error. Petition for Writ of Error. Carter, Ledyard & Milburn, Att'ys for Relator, 54 Wall street, N. Y. Re'd May 24 1906.

66 Supreme Court of the United States.

PEOPLE OF THE STATE OF NEW YORK *ex Rel.* ALBERT J. HATCH,
Plaintiff in Error,
against
EDWARD REARDON, a Peace Officer of the County of New York,
Defendant in Error.

Assignment of Errors.

Now comes Albert J. Hatch, the above named relator, by Lewis Cass Ledyard, John G. Milburn and John F. Dillon, his attorneys, and, in connection with the petition for a writ of error filed herewith, says that in the record and proceedings in this cause and in the final order and judgment made and entered herein by the Supreme Court of the State of New York, in and for the County of New York, on the 24th day of April, 1906, on a remittitur from the Court of Appeals of the State of New York, there is manifest error in this, to wit:

First: That the said Court erred in declining to hold that the Act of the Legislature of the State of New York, known as Chapter 241 of the Laws of 1905, entitled "An Act to Amend the Tax Law, by Providing for a Tax on Transfers of Stock," under the authority of which the relator above named was arrested and taken into custody and the said order and judgment were made, is in contravention of the Fourteenth Article of Amendment to the Constitution of the United States, in that it deprives the said relator of his liberty and property without due process of law.

67 Second: That the said Court erred in declining to hold that the said Act is in contravention of the said Fourteenth Article of Amendment to the Constitution of the United States, in that it denies to the said relator the equal protection of the laws.

Third: That the said Court erred in declining to hold that the said Act is in contravention of Section 8 of Article I of the Constitution of the United States, in that it amounts to a regulation by the State of New York of commerce with foreign nations and among the several States.

Fourth: That the said Court erred in holding that the Relator

was not entitled under the Constitution of the United States to be discharged from custody, for the reason that the transaction set forth in the criminal complaint was an interstate commercial transaction within the meaning of the Constitution of the United States; and that the Court also erred in holding that under the Constitution of the United States the said transaction could be made a misdemeanor by the Legislature of the State of New York, and in further holding that under the Constitution of the United States the said transaction set forth in the complaint could be taxed by the State of New York, as attempted, in and by said Chapter 241 of the Laws of New York of 1905.

Dated the 23rd day of May, 1906.

LEWIS CASS LEDYARD,
JOHN G. MILBURN,
JOHN F. DILLON,
Attorneys for Petitioner.

68 [Endorsed:] United States Supreme Court. People of the State of New York *ex rel* Albert J. Hatch, Plaintiff in error, against Edward Reardon, a Peace Officer of the County of New York, Defendant in error. Assignment of Errors. Carter, Ledyard & Milburn, Att'ys for Relator, 54 Wall street, N. Y. Rec'd May 24 1906.

69 UNITED STATES OF AMERICA, *ss:*

To Edward Reardon, a Peace Officer of the County of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United Staets, to be holden in the City of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of New York, for the County of New York, in an action wherein the People of the State of New York *ex rel.* Albert J. Hatch is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus W. Peckham, associate Justice of the Supreme Court of the United States, this 23d day of May, in the year of our Lord one thousand nine hundred and six.

R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.

70 The receipt of a copy of the above citation, and sufficient service thereof, is hereby admitted this 24th day of May, A. D., 1906.

WM. TRAVERS JEROME,
District Attorney of the County of New York
and Attorney for Defendant in Error.
E. C. K.
JULIUS M. MAYER,
Attorney General of the State of New York.
W. B.

71 [Endorsed:] Supreme Court of the U. S. People of the State of New York *ex rel.* Albert J. Hatch, Pl'ff, against Edward Reardon, a Peace Officer of the County of New York, Def't in error. Citation. Carter, Ledyard & Milburn, Att'ys for Def't in error, 54 Wall street, N. Y. Re'd May 24 1906.

72 Know all men by these presents, that we, Albert J. Hatch, as principal, and The United States Fidelity and Guaranty Company, a corporation, as Surety, are held and firmly bound unto Edward Reardon, a Peace Officer of the County of New York, State of New York, in the full and just sum of One Thousand ($1,000.) dollars, to be paid to the said Edward Reardon, a Peace Officer, of the County of New York, State of New York, his executors, administrators or successors in office, certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 22nd day of May, in the year of our Lord one thousand nine hundred and six.

Whereas, lately in the Supreme Court, of the State of New York, in a suit depending in said Court, between the People of the State of New York, *ex rel.* Albert J. Hatch, Petitioner, and the said Edward Reardon, a Peace Officer of the County of New York, State of New York, a final order and judgment were rendered against the said People of the State of New York, *ex rel.* Albert J. Hatch, on a remittitur from the Court of Appeals of the State of New York, and the said People of the State of New York, *ex rel,* Albert J. Hatch, having obtained from a Justice of the Supreme Court of the United States a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the order & decree in the aforesaid suit, and a citation directed to the said Edward Reardon citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Albert J. Hatch shall prosecute said Writ of Error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of The United States Fidelity and Guaranty Company.]

THE UNITED STATES FIDELITY AND
GUARANTY COMPANY, [SEAL.]
By SYLVESTER J. O'SULLIVAN, *Manager.* [SEAL.]
Attest: GEORGE E. HAYES,
Attorney in Fact. [SEAL.]

Sealed and delivered in presence of
EDMUND A. TALLMAN,
CHAS. W. YOUNG,
As to U. S. F & G. Co.

Approved by—

——— ———,
Associate Justice of the Supreme Court of the United States.

73 *Affidavit, Acknowledgement, and Justification by the United States Fidelity and Guaranty Company.*

STATE OF NEW YORK, *County of New York, ss:*

Before me personally came Sylvester J. O'Sullivan, known to me to be the Manager of The United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Albert J. Hatch as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Manager of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Albert J. Hatch is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Manager of said Company; and that he is acquainted with George E. Hayes, and knows him to be Attorney in Fact of said Company; and that the signature of said George E. Hayes, subscribed to said bond is the genuine handwriting of said George E Hayes, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of one million dollars ($1,000,000.00).

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 22nd day of May, 1906.

H. L. PROTZMAN,
[SEAL.] *Notary Public, New York County.*

74 [Endorsed:] Supreme Court of the United States. People of the State of New York, *ex rel.* Albert J. Hatch, Pl'ff in error against Edward Reardon, a Peace Officer of the County of New York, Def't in error. Copy. Bond on Writ of Error. Carter, Ledyard & Milburn, Att'ys for Pl'ff in error, 54 Wall street, N. Y. Approved May 23 1906. R. W. Peckham Asso. Jus. Sup. Ct. U. S.

75 STATE OF NEW YORK, *County of New York:*

Clerk's office of the Supreme Court of the State of New York for the County of New York.

I, Peter J. Dooling, Clerk of the County of New York and of the Supreme Court of the State of New York, for the said County of New York, by virtue of the annexed writ of error which was served

upon me on the twenty fourth day of May 1906 and in obedience thereto, do hereby certify that the foregoing Pages Numbered from 1 to 58 inclusive contain a true and complete transcript of the record and proceedings had in said Court in the suit The People of the State of New York *ex Rel.* Albert J. Hatch *vs.* Edward Reardon a Peace Officer of the County of New York mentioned in said writ of error as the same remain of record and on file in *ly* office and that annexed hereto is the petition for the said writ of error the citation to the writ in error with proof of service of the same, the said writ of error served upon me.

In testimony whereof I have caused the Seal of the said Court to be hereunto affixed at my office in the City and County of New York, on the 25th day of May 1906.

[Seal New York.]

PETER J. DOOLING, *Clerk.*

76 THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* ALBERT J. HATCH, Appellant,

v.

EDWARD REARDON, a Peace Officer of the County of New York, Respondent.

People *ex Rel.* Hatch *v.* Reardon, 110 App. Div., 821, Affirmed.

(Argued March 5, 1906; decided April 17, 1906.)

Appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 1,
77 1906, which affirmed an order of Special Term dismissing a writ of *habeas corpus* and remanding the relator to custody.

On the 8th of June, 1905, the relator was arrested under a warrant issued by a justice of the Court of Special Sessions of the city of New York, charging him with the commission of a misdemeanor in that on the 7th of June, 1905, at the city of New York, he violated chapter 241 of the Laws of 1905 "by the sale and delivery of certain shares of stock of certain railroad corporations without making any bill or memorandum of such sale, or affixing any stamp or stamps to such a bill or memorandum, or in any way paying the tax as required by said act."

The complaint was made by a resident of the state of Connecticut against the relator, who is also a resident of that state. In his affidavit for the warrant the complainant swore that he was a broker by occupation and carried on that business at number 20 Broad street in the city of New York; that in said city, on the day named, the relator sold to him "100 shares of the common capital stock of the Southern Railway Company, a corporation organized under and by virtue of the laws of the state of Virginia and owning and operating a system of railroads situated wholly without the state of New York, of the par value of $100 per share, for the sum of $30.75 per share in cash, that being the then market value of said shares, and 100

shares of the common capital stock of the Chicago, Milwaukee and St. Paul Railroad Company, a corporation organized under the laws of the state of Wisconsin, and owning and operating a system of railroads situated wholly without the state of New York, of the par value of $100 per share, for the sum of $172 per share, that being the then market value of said shares." On payment of the purchase price, amounting to $20,275, the relator delivered to the complainant two certificates of stock representing such shares, assigned in blank, "without affixing to any bill or memorandum thereof, or to any other paper, any stamp or stamps, and without paying
78 any tax on making such sale and delivery, although requested by deponent so to do, in violation of the provisions" of said act.

It did not appear when, by whom, from what place, or for what purpose, either certificate was brought into this state, or that it was brought here at all. The history of the certificates, so far as given, is simply that they were in the city of New York on the day named, and that they were then and there sold and delivered by the relator to the complainant.

A writ of *habeas corpus* issued to test the validity of said statute was dismissed by the justice of the Supreme Court before whom it was returnable and the usual order remanding to custody was made. Upon appeal to the Appellate Division the order was affirmed, one of the justices dissenting, and the relator appealed to this court.

John G. Milburn and John F. Dillon for appellant.

The act is, because of its arbitrary and discriminating character and operation, a violation of the fundamental principles of the taxing power and a taking of property without due process of law, contrary to the Constitution of the state and of the United States, and it denies to holders of the stock of corporations the equal protection of the laws in violation of the fourteenth amendment to the Federal Constitution. (Loan Assn. *v.* Topeka, 20 Wall. 663; State *v.* Switzler, 143 Mo. 287; Cooley on Taxn. [3d. ed.] 72; L. F. Co. *v.* Kentucky, 188 U. S. 385; U. T. Co. *v.* Kentucky, 199 U. S. 194; Genet *v.* City of Brooklyn, 99 N. Y. 296; People *v.* E. T. Co., 96 N. Y. 387; Matter of McPherson, 104 N. Y. 317; Matter of Pell, 171 N. Y. 48; Yick Wo *v.* Hopkins, 118 U. S. 356; Claybrook *v.* Owensboro, 16 Fed. Rep. 297.) The act is invalid because it arbitrarily fixes the amount of the tax regardless of the value of the shares sold or the sum for which they are sold. (B. G. R. R. Co. *v.* Penn., 134 U. S. 232; Jennings *v.* C. R. Co., 147 U. S. 147.) The act is invalid because in imposing a tax on sales of the shares of a foreign corporation owned by non-residents it is virtually a tax on property
79 without the jurisdiction of the state. (State Tax on Foreign Held Bonds, 15 Wall. 300; Delaware Railroad Tax, 18 Wall. 206; People *v.* E. T. Co., 96 N. Y. 387; U. T. Co. *v.* Kentucky, 199 U. S. 194; People *v.* Coleman, 126 N. Y. 437; Flynn *v.* Brooklyn City R. R. Co., 158 N. Y. 504; Matter of Euston, 113 N. Y. 181; Matter of James, 144 N. Y. 12; Matter of Bronson, 150 N. Y. 1; Plymton *v.* Bigelow, 93 N. Y. 592.) This tax law is void under the commerce clause of the United States Constitution because it

taxes any sale within the state of New York of stock in a foreign corportion, though such stock belongs to a person not a resident of the state of New York, and such sale is made by such non-resident. (Matter of Euston, 113 N. Y. 174; Jellinik *v.* H. C. M. Co., 177 U. S. 1; Robbins *v.* S. C. T. District, 120 U. S. 489; Corson *v.* Maryland, 120 U. S. 502; Asher *v.* Texas, 128 U. S., 129; Stockard *v.* Morgan, 185 U. S. 27; Gibbons *v.* Ogden, 9 Wheat. 1; Brown *v.* Maryland, 12 Wheat. 419; Hopkins *v.* U. S., 171 U. S. 578; Henderson *v.* Mayor, etc., 92 U. S. 259.) The statute in question was not passed by the assembly in accordance with section 15 of article 3 of the Constitution of the state of New York in this, to wit: That no bill was introduced into that body or sent from the senate into that body until April 4, 1905, one day before its final passage by that body April 5, 1905, and, therefore, the assembly did not comply with said section 15 of the Constitution. (Thomas *v.* R. R. Co., 101 U. S. 71; People *v.* Supervisors, 8 N. Y. 317.)

Julius M. Mayer, Attorney-General (John R. Dos Passos of counsel), for respondent.

The act is not "arbitrary and discriminating" in its character and operation, and does not violate "the fundamental principles of the taxing power," which we must assume is only a way of stating that it takes appellant's property "without due process of law," against the Federal and State Constitutions, and denies to the holders of the stock of corporations "the equal protection of the laws," in violation of the 14th amendment to the Constitution of
80 the United States. (Knowlton *v.* Moore, 178 U. S. 60; Thomas *v.* U. S., 192 U. S. 363; Nicol *v.* Ames, 173 U. S. 509; P. Ins. Co. *v.* Soule, 7 Wall. 445; Auer *v.* Washington Mills, 11 Allen, 274; Coulter *v.* L. & N. R. R. Co., 196 U. S. 599; Matter of Prime, 137 N. Y. 354; Matter of McPherson, 104 N. Y. 317; Matter of Romaine, 127 N. Y. 80; Matter of Whiting, 150 N. Y. 29.) The act neither creates discrimination nor produces confiscation of property, under the Constitution of New York or of the United States, or under the 14th amendment. (H. B. Co. *v.* Henderson City, 173 U. S. 592; Nicol *v.* Ames, 173 U. S. 518; Matter of Whitney, 150 N. Y. 30; T. Ins. Co. *v.* Connecticut, 185 U. S. 371; Matter of McPherson, 104 N. Y. 316; Magoun *v.* I. T. & S. Bank, 170 U. S. 293; G. R. R. Co. *v.* Penn., 134 U. S. 232; People *v.* H. Ins. Co., 92 N. Y. 337.) The law does not violate the commerce clause of the Constitution either between the states or as to foreign nations. (Tinsley *v.* Anderson, 171 U. S. 101; Nicol *v.* Ames, 173 U. S. 521; Passenger Cases, 7 How. [U. S.] 283; State Tax on Foreign Held Bonds, 15 Wall. 300; S. Society *v.* Multnomah Co., 169 U. S. 421; New Orleans *v.* Stempel, 175 U. S. 309; D. R. R. Tax, 18 Wall. 206; S. S. Co. *v.* Pennsylvania, 122 U. S. 326; V. & C. R. R. Co. *v.* V. C. R. R. Co., 63 Vt. 119; People *ex rel.* C. C. Co. *v.* Morgan, 178 N. Y. 439.)

William Travers Jerome, District Attorney (E. Crosby Kindleberger of counsel), for respondent.

The act was properly passed. (Const. of N. Y. art. 3, § 15.) The tax was not one on property but on the exercise of a privilege.

(City of New York *v.* McLean, 170 N. Y. 374; Matter of McPherson, 104 N. Y. 306; Thomas *v.* U. S. 115 Fed. Rep. 207; 192 U. S. 363; Orr *v.* Gilman, 183 U. S. 329; Clark *v.* Titusville, 184 U. S. 329; Cook *v.* Marshall Co., 196 U. S. 261; Kehrer *v.* Stewart, 197 U. S. 60; French *v.* B. A. P. Co., 181 U. S. 324; Cook *v.* Penn., 97 U. S. 566; Brown *v.* Maryland, 12 Wheat. 419.) The state
81 had jurisdiction, notwithstanding the fact that the shares transferred were those of foreign corporations. (H. L. Ins. Co. *v.* N. Y., 134 U. S. 594; 92 N. Y. 328; N. Y. *v.* Roberts, 171 U. S. 658; Matter of Palmer, 183 N. Y. 328; People *v.* Com'rs., 4 Wall 258; Simpson *v.* J. C. C. Co. 165 N. Y. 193; Kidd *v.* Alabama, 188 U. S. 730; U. T. Co. *v.* Kentucky, 199 U. S. 194.) The act is not objectionable as depriving any person of his property without due process of law. (Hagar *v.* Reclamation District, 111 U. S. 701; B. G. R. R. Co. *v.* Pennsylvania, 134 U. S. 232; U. S. *v.* Thomas, 115 Fed. Rep. 207; 192 U. S. 363.) The Stock Transfer Act does not constitute a denial of the equal protection of the laws. (B. G. R. R. Co. *v.* Penn., 134 U. S. 232; Wright *v.* Hart, 182 N. Y. 330; K. R. R. Tax Case, 115 U. S. 321; P. E. Co. *v.* Siebert 142 U. S., 339; W. & S. P. Co. *v.* Minn., 159 U. S. 526; A. E. Co. *v.* Ohio, 165 U. S. 195; Magoun *v.* I. T. & S. Bank, 170 U. S. 283; Nicol *v.* Ames, 173 U. S. 509; A. S. R. Co. *v.* La., 179 U. S. 89; Connolly *v.* U. S. P. Co., 184 U. S. 562.) The act is not in violation of the commerce clause of the Federal Constitution. (Woodruff *v.* Parham, 8 Wall. 123; A. S. & W. Co. *v.* Speed, 192 U. S. 520; Kehrer *v.* Stewart, 197 U. S. 60; A. P. Co. *v.* Lacy, 200 U. S. 226.)

VANN, *J.*:

The issue of law joined by the petition, return and reply is whether the legislature had power to enact, and did in fact enact, chapter 241 of the Laws of 1905, which provides for a tax on the sale and transfer of stock certificates. That act is part of the Tax Law, which it amends by adding a new article known as number fifteen. It imposes a tax "on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any domestic or foreign association, company or corporation, made after the first day of June, 1905," of two cents "on each hundred dollars of face value or fraction thereof." Payment of the tax must be denoted by an adhesive stamp or stamps affixed in a manner adapted
to the circumstances of the sale. A violation of the act by
82 transfer without payment of the tax is made a misdemeanor and may be punished by fine, or imprisonment, or both, and the offender is also subject to "a civil penalty of five hundred dollars for each violation," to be recovered by the state comptroller in any court of competent jurisdiction. The statute further provides that no transfer of stock without payment of the tax "shall be made the basis of any action or legal proceedings, nor shall proof thereof be offered or received in evidence in any court in this state." The taxes thus imposed "and the revenues thereof shall be paid by the state comptroller into the state treasury and be applicable to the gen-

eral fund, and to the payment of all claims and demands which are a lawful charge thereon."

The act is attacked as invalid on the ground that it was prematurely passed before it had been on the desks of the members of the legislature in its final form for at least three calendar legislative days prior to its final passage, as required by section 15, article 3 of the Constitution; that it makes an improper classification; that the tax is imposed on a wrong basis; that it is imposed upon property without the state, and that the act violates the commerce clause of the Federal Constitution.

After carefully considering these objections, we have reached the conclusion that they are not well founded and the following are our reasons, so far as we have found time to express them:

First. The statute in question originated, as a bill, in the senate, where it was amended from time to time and reprinted as often as it was amended. Printed copies thereof, as it was when introduced and as it was each time after it was amended, were promptly placed on the desks of the members of both houses when it was introduced and after each amendment. This was not required by any written rule of the legislature but was in accordance with the general practice that has prevailed since the Constitution of 1894 was adopted. The bill was passed by the senate on the third of April, 1905, was sent to the assembly for its concurrence on the fourth and was
83 finally passed by that body on the fifth, neither the governor nor the acting governor having certified to the necessity of its immediate passage. The journal of the assembly states that the bill was "printed and on the desks of the members in its final form at least three calendar legislative days prior to its final passage." These are, in substance, the facts relating to the subject as alleged in the petition for the writ and not denied in the return.

The Constitution provides that "No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the Governor, or the acting Governor, shall have certified to the necessity of its immediate passage, under his hand and the seal of the State." (Const. art. 3, § 15.)

The object of this provision, which first appeared in the Constitution of 1894, is to prevent hasty and careless legislation, to prohibit amendments at the last moment and to secure more publicity than had been required before. Care was taken to provide for emergencies by a certificate of necessity from the governor, which authorizes immediate action. The requirement is not directory, but mandatory, as is obvious from the form of the command, which prohibits a bill from becoming a law without compliance therewith. The question is, who are meant by "the members" upon whose desks the printed bill is to be placed? Does the provision mean that the members of the legislature are to have the bill on their desks for three days prior to its final passage, which was the fact in the instance before us; or that the members of the house in which it originated must first have it on their desks for three days, and after they have passed it the members of the other house must have it on their desks for

three days more before they can pass it? If the latter is the true meaning of the requirement, it was not obeyed, for the bill was passed by the assembly on the second day after it was passed by the senate.

The Constitution created the legislature as an entity, consisting of two houses, the senate and assembly. Its every article, except the last, which relates only to the date of operation, and in almost every section it recognizes the existence of the legislature, as such. Grants of power are made to the legislature and restrictions upon the exercise of power are directed to the legislature, not to the senate and assembly. Both senators and assemblymen are members of the legislature, and as such are required to take an oath of office. (Art. 13, § 1.) The command of the people is addressed to the legislature continuously throughout the fundamental law. Thus it provides that "no member of the Legislature shall receive any civil appointment within this State • • • during the time for which he shall have been elected," and that "no person shall be eligible to the Legislature" under certain circumstances (Art. 3, §§ 7 and 8); directs that "the members" shall not be questioned "for any speech or debate in either house of the Legislature" (Id. § 12); that senators and members of assembly shall be elected on a day named "unless otherwise directed by the Legislature" (Id. § 9); that "no private or local bill, which may be passed by the Legislature, shall embrace more than one subject" (Id. § 16); that "the Legislature shall not pass a private or local bill" in certain cases (Id. § 18); that "the Legislature shall neither audit nor allow any private claim or account against the State" (Id. § 19); that the governor may "convene the Legislature, or the Senate only, on extraordinary occasions," and shall "communicate by message to the Legislature" (Art. 4, § 4); speaks of "the final adjournment of the Legislature" (Id. § 9); "the Legislature at its next meeting" (Id. § 5), and the "next session of the Legislature" (Art. 5, § 7); authorizes the legislature to alter judicial districts and create judicial departments (Art. 6, §§ 1 and 2); prohibits "the Legislature" from selling certain canals (Art. 7, § 8), and from suspending specie payments (Art. 8, § 5); requires it to provide a system of free common schools (Art. 9, § 1); to provide for filling vacancies in office (Art. 10, § 5); to organize the militia (Art. 11, § 3); to incorporate cities and villages (Art. 12, §§ 1, 2), and to submit proposed amendments to the people (Art. 14, § 1).

Many other sections, containing similar provisions, might be cited, but the foregoing are sufficient to show that while the senate and assembly are separate bodies, they constitute the legislature; that their united action becomes the act of the legislature and that the members of both houses are members of the legislature. A bill is the draft of a proposed statute submitted to the legislature for enactment. It cannot become a law by the action of the senate alone, or of the assembly alone, but only by the action of both; when it becomes an act of the legislature, subject to the approval of the governor. It may originate in either house and when introduced in either it is before the legislature, or else no bill can ever get before it, for each house is part of the legislature. When, therefore, the

Constitution provides that no bill shall be passed unless it shall have been printed and upon the desks of "the members" in its final form for a certain period, it means the members of the legislature, not the members of the senate and assembly, merely as such. This is emphasized by the contrast in the form of the command when action is required by the members of each house separately, as in section twenty of article third relating to the requirement of "a two-third vote" upon a bill "appropriating the public moneys or property for local or private purposes." There the command is addressed "to the members elected to each branch of the Legislature," separately, instead of to the members of the legislature, collectively, which is the usual form. When the Constitution speaks of three calendar legislative days it means three calendar days of the legislature, or days when the legislature is in session. It does not mean six days, which the construction contended for would involve. The bill in its final form, that is in the form in which it becomes a law, must be on the desks of all members of both houses for three days before it is passed by either. But one occasion for placing it on the desks is named, not two separate occasions, the first con-
86 fined to one house and the second to the other. All members of the legislature are thus given notice of every bill when introduced into either house and when amended by either house. No reprinting is required as the bill goes from one house to the other unless it has been amended, and whenever amended it must be reprinted. Every member is informed at once of bills pending in either house, so that he can promptly study the proposed legislation, communicate with his constituents, note the comments of the press, observe the state of public opinion and appear before the committee to which the bill is referred in the house of its origin for the purpose of making suggestions before he is called upon to vote in his own house. It prevents artful and dangerous amendments just before the final vote, which was formerly a great evil. It has the same effect, so far as publicity and opportunity for deliberate consideration are concerned, as if every bill were introduced into each house at the same time. The construction thus indicated is reasonable and proper, for it follows the Constitution as written, complies with its spirit and fulfills its purpose. It is in accordance with the practical construction of every legislature that has been in session since the provision was adopted, and the constitutional debates show that this was the construction of the convention which adopted it. (Revised Records, 887, 917.)

We can give no heed to the criticism of counsel that there is no statute or written rule requiring bills to be placed on the desks of members, for it is not the province of the courts to direct the legislature how to do its work. It is sufficient for us that the Constitution requires each house "to keep a journal of its proceedings" and that the journal of the assembly, which may be consulted to support a statute, shows that the constitutional provision in question was complied with when the act before us was passed. (Art. 3, § 11.)

Second. The classification made by selecting one kind of property and taxing the transfer of that only, is assailed as so arbitrary,

discriminating and unreasonable as to deprive certain persons of their property without due process of law and to withhold from them the equal protection of the laws.

87 All taxation is arbitrary, for it compels the citizen to give up a part of his property; it is generally discriminating, for otherwise everything would be taxed, which has never yet been done, and there would be no exemption on account of education, charity or religion, and frequently it is unreasonable, but that does not make it unconstitutional, even if the result is double taxation. (People *v.* Home Ins. Co., 92 N. Y. 328, 347.) The right to tax is not granted by the Constitution but of necessity underlies it, because government could not exist or perform its functions without it. While it may be regulated and limited by the fundamental law, it exists "independently of it as a necessary attribute of sovereignty." (People *v.* Adirondack Ry. Co., 160 N. Y. 225, 236.) "The power of taxation being legislative, all the incidents are within the control of the legislature. The purposes for which a tax shall be levied; the extent of taxation; the apportionment of the tax; upon what property or class of persons the tax shall operate; whether the tax shall be general or limited to a particular locality, and in the latter case, the fixing of a district of assessment; the method of collection, and whether a tax shall be a charge upon both person and property, or only on the land, are matters within the discretion of the Legislature and in respect to which its determination is final." (Genet *v.* City of Brooklyn, 99 N. Y. 296, 306.)

"A tax may be imposed only on certain callings and trades, for when the state exerts its power to tax it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if the state could not tax any property or calling unless at the same time it taxed all property or all callings." (Connolly *v.* Union Sewer Pipe Co. 184 U. S. 540, 562; Armour Packing Co. *v.* Lacey, 200 U. S. 226, 235.)

"We cannot say that treating stocks of corporations as a class subject to special restrictions was unjust discrimination or denial of the full protection of the laws." (Otis *v.* Parker, 187 U. S. 606, 610.)

"The Legislature must decide when and how and for what
88 public purposes a tax shall be levied and must select the subjects of taxation." (1 Cooley on Taxation [3rd ed.], 255.)

There is no express restriction upon this power in our State Constitution and no implied restriction, except by the primary guaranties relating to life, liberty, property and due process of law. The same is true of the Federal Constitution except as to certain subjects of national interest under the control of Congress, such as imports, patent rights and agencies used to carry the powers of Congress into execution. Subject to these restraints, the legislature has supreme control of the power to tax, and its action, even if arbitrary, discriminating and unreasonable, is binding upon all persons and property within the boundaries of the state. The state retained all the power of legislation that it did not part with in adopting the Federal Constitution or consenting to the amendment thereof, and subject to that exception, it is as supreme as the British Parliament,

which is restrained only by the custom of the realm and the conservatism of the people. Taxes upon the right of succession to property by will and intestate law, on special franchises and upon the sale of intoxicating liquors, are recent instances of the exercise of this power by the state through the selection of special subjects of taxation, involving the exemption of all others, each of which was attacked as in violation of both Constitutions, but all were sustained by the courts. The tariff and internal revenue laws show that the same power of selection has been exercised by Congress, and the Federal courts have uniformly upheld it. Indeed, the prototype of the statute before us was an act of Congress passed in 1898, known as the "War Revenue Act," imposing a stamp tax on sales, transfers and deliveries of stock certificates, which was sustained without dissent by the Circuit and Supreme Courts of the United States. (30 U. S. Stat. 448; United States *v.* Thomas, 115 Fed. Rep. 207; 192 U. S. 363.) A like tax on sales of merchandise, although expressly limited to those made at "any exchange or board of trade," leaving all other sales untouched, was also sustained, and the declaration made that "a sale at an exchange does form a proper basis for a
89 classification which excludes all sales made elsewhere from taxation." (Nicol *v.* Ames, 173, U. S. 509, 521.)

The legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon others, the remedy for injudicious action being in the hands of the people, not of the courts. Arbitrary selection and discrimination characterize the history of legislation, both state and national, with reference to taxation, yet, when all persons and property in the same class are treated alike, it has uniformly been sustained both by the state and Federal courts. The tax on tobacco, on oleomargarine and the like is not less arbitrary or discriminating than the tax in question. While a tax upon a particular house, or horse, or the houses or horses of a particular man, or on the sale thereof, would obviously invade a constitutional right, still a tax upon all houses, leaving barns and business buildings untaxed, or upon all horses or the sale thereof, leaving sheep and cows untaxed, however unwise, would be within the power of the legislature. This is true of a tax on all houses with "more than one chimney," or "with more than one hearth-stone," or on all race-horses. The power of taxation necessarily involves the right of selection, which is without limitation, provided all persons in the same situation are treated alike and the tax imposed equally upon all property of the class to which it belongs. (Matter of McPherson, 104 N. Y. 306, 318; Matter of Gould, 156 N. Y. 423, 427.) The equal protection of the laws "only requires the same means and methods to be applied impartially to all the constituents of each class, so that the laws shall operate equally and uniformly upon all persons in similar circumstances." (Kentucky R. R. Cases, 115 U. S. 321, 337.) Or, in other words, all persons must "be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." (McGoun *v.* Illinois Trust and Savings Bank, 170 U. S. 283, 293; Hayes *v.* Missouri, 120 U. S. 68; Barbier *v.*

Connolly, 113 U. S. 27, 32.) "Let it reach all of a class, either of persons or things, it matters not whether those included in it
90 be one or many, or whether they reside in any particular locality or are scattered all over the state." (1 Cooley on Taxation [3rd ed.], 260.)

The tax in question is not imposed upon property, but on the transfer of a certain class of property, extensively bought and sold throughout the state. It does not discriminate between different kinds of stock, taxing the sale of some and leaving others untaxed, but treats all in the class alike. The class includes all sales of certificates issued by any domestic or foreign association, company or corporation. It is a large and comprehensive class, as is shown by the revenue produced, which amounts to five or six millions per annum. The sales affected are made chiefly for speculation which may have influenced the legislature in making the selection. The statute operates equally and uniformly upon all transfers of the class named when made by any person within the state. All persons who sell stocks are treated alike and all parts of the state are treated alike. It applies with equal force to all sales, whether in the city or country, in exchanges, offices or on the street, by farmers, mechanics, brokers and others. The classification violates neither Constitution.

Third. It is claimed that the statute is invalid because it fixes the amount of the tax regardless of the value of the certificates sold or of the sum for which they are sold.

The tax in question is an excise tax which need not depend upon any principle of valuation or on any notice to the tax-payer. It is not a direct tax governed by the rule of appraisement, but an indirect tax governed by the rule of uniformity. It is not like a general tax upon the bulk of property in the state which must be paid in any event, for if there is no sale there is no tax. Neither notice nor grievance day is required, for no valuation is made except by the statute itself, and there is no provision in either Constitution requiring such a tax to be laid on an ad valorem basis. There can be no tax without a sale, even if the property is of great value and is owned in every household. When a sale is made the tax follows, and the legislature had the right to measure it in any way that it saw fit.

91 A tax of two cents on every check, regardless of the amount for which it was drawn, and of five cents on a written contract, whether it covered a transaction involving hundreds or thousands, may be referred to as examples of what has been done without serious question in the imposition of excise taxes. A poll tax does not depend upon the income or earning capacity of the persons subjected to it. A tax on carriages, guns and watches does not rest on the value of the subjects taxed. They are counted, not appraised. (Hylton *v.* United States, 3 Dall. 171; Bells Gap R. R. Co. *v.* Pennsylvania, 134 U. S. 232, 237.) The same is true of an excise tax on legal process, domestic animals, avocations and the like of which there have been many instances during the history of the nation and the different states. Such powers of taxation, as was said in a late

case, "have admittedly belonged to state and nation from the foundation of the government." (Knowlton *v.* Moore, 178 U. S. 41, 60.) "Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll-taxes, license taxes (not dependent on the extent of his business) and generally, specific taxes on things, or persons, or occupations. In such cases the legislature fixes its amount and that is the end of the matter. * * * No right of his is therefore invaded. Thus if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, there is nothing the owner can do which can affect the amount to be collected from him." (Hagar *v.* Reclamation District, 111 U. S. 701, 709.)

Convenience in doing business, the slight cost of collection and the necessity of preventing evasion are important considerations in laying an excise tax and the rule of counting rather than valuing is almost universally adopted, so that the citizen may know at once the amount of the tax and pay it by affixing the stamps required, which are permanent evidence of the sum paid. The statute itself in all such cases, as well as in the case under consideration, appor-
92 tions the tax and the power of apportionment is part of the power of taxation. As was said by this court many years ago: "The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes cannot be laid without apportionment, and the power of apportionment is, therefore, unlimited, unless it be restrained as a part of the power of taxation. There is not, and since the original organization of the state government, there has not been any such constitutional limitation or restraint." (People *ex rel.* Griffin *v.* Mayor etc., Brooklyn, 4 N. Y. 419, 427.) The highest Federal court sustained without hesitation an assessment upon the nominal or face value of bonds instead of upon their actual value, and also declared that absence of notice to the owners of the bonds was not a taking of the bondholder's property without due process of law. (Bells Gap R. R. Co. *v.* Pennsylvania, 134 U. S. 232; Jennings *v.* Coal Ridge Improvement & Coal Co., 147 U. S. 147.) In the Thomas case, precisely as in the case before us, the tax was measured by "each hundred dollars of face value or fraction thereof." As our legislature has all the power of legislation with reference to taxation that the state has, of necessity it has as much power to classify and measure as belongs to Congress. Hence, this point as well as the last preceding, was involved and decided in the Thomas case even if no expression of consideration appears in the opinions (United States *v.* Thomas, 115 Fed. Rep. 207; 192 U. S. 363). We think that the apportionment, even when so unequal in result as it was in the two sales described in the affidavit of the complainant, is within the exclusive control of the legislature, with no power in the courts to interfere.

Fourth. It is insisted that a tax on the transfer of stock certificates issued by a foreign corporation and owned by a non-resident, although made within this state, is virtually a tax on property without the jurisdiction of the state.

This position is founded on the theory that the shares of capital

stock of a corporation represent its property and if that property is not within the state the shares are not taxable here unless the
93 owner resides here. The tax, however, is not on property, but on the sale of property, or on a particular kind of contract when made within this state. The certificate, itself, is not liable for the tax, but the person selling it is. The tax is not a lien on certificates, nor on shares, which may be owned to any extent throughout the state, free from any claim under the statute in question. It is the sale alone that gives rise to the tax, which is imposed through the command of the law to the seller to pay the tax when the contract to sell is made, and it is enforced not by levy and sale, but by civil and penal remedies against the person of the seller. While this tax, the same as all other taxes, must ultimately come out of the property of the seller, it cannot be enforced against the certificate sold as distinguished from his other property.

The question is whether the state has jurisdiction to impose a tax on a certain class of contracts when made within its territorial limits? Jurisdiction over the persons who make the contract does not depend on their residence, but on their presence within the state when the contract is made. Jurisdiction over property depends on its physical presence here, or if it is personal property, either its presence here or the residence of the owner here. The fiction of the common law, *mobilia sequuntur personam*, has no foundation in the Constitution and does not control the legislature, which rejects or adopts it at will as applied to the subject of taxation. When two citizens of Connecticut come into this state and make a contract here, to be enforced here, both they and their contract are subject to its laws, and they are not only entitled to the protection thereof, but are under the same obligation to obey as if they were citizens. Such a contract is valid or invalid as our laws declare. When the law commands that if they, or any other persons, whether residents or not, make a certain contract here they must pay a certain tax for the privilege, the command is personal, addressed to them as persons then within the state, and is as binding on them as if they resided in the state. Their rights and their obligations in reference to such a contract are the same as if they were citizens, no greater and no less. The fact that the contract, though made here, may relate to property,
94 real or personal, situated elsewhere, has no bearing upon the question. By coming into the state they subjected themselves to its laws and to its taxing power, so far as the making of such a contract is concerned. It is immaterial whether the contract is between residents or non-residents, or between a resident and a non-resident, for if it is made within the state it is subject to taxation by the state. This necessarily follows from the power of the state over the subject of taxation. It has power to tax all property within its territory, all business done and all contracts made within that territory, provided they are not protected as Federal agencies, whether the property is owned or the business is done or the contracts are made by residents or non-residents. "It has never been questioned that the Legislature can impose a tax on all sales of property, upon all incomes, upon all acquisitions of property, upon all business and upon all transfers." (Matter of McPherson, 104 N. Y. 306, 317.)

We think such specific or excise taxes are laid upon privileges rather than on property. (Orr *v.* Gilman, 183 U. S. 278, 289; Clark *v.* Titusville, 184 U. S. 329; United States *v.* Thomas, 192 U. S. 363; Foppino *v.* Speed, 199 U. S. 501, 520.) This was distinctly held in the Thomas case, and necessarily so held, for if a tax on certificates is a tax on property it is a direct tax requiring apportionment "among the several states * * * according to their respective numbers." (Art. 1, § 2, par. 3.) But, even assuming that a tax on the sale of property is, in effect, a tax on the property itself, what are certificates of stock and how may they be treated by the state for the purpose of taxation? They may be treated as property from the function they perform and the use that is made of them. They may well be regarded as a distinct species of property, for they now represent the bulk of property in the state and are the universal medium of transfer. As we said in a recent case: "The main use of certificates is for convenience of transfer, and they are treated by business men as property for all practical pur-
95 poses. They are sold in the market, transferred as collate[illegible] security to loans and are used in various ways as prop[illegible] They pass by delivery from hand to hand, are the subject of lar[illegible] and are taxable generally in this State." (Matter of Whiting, 1[illegible] N. Y. 27, 30.) Although issued by a foreign corporation and owned by a non-resident, if they are found within the state they may be seized under a warrant of attachment. (Simpson *v.* Jersey City Contracting Co., 165 N. Y. 193.) Speaking of the nature of a share of stock, Mr. Justice Nelson declared it to be "a distinct, independent interest or property, held by the stockholder like any other property that may belong to him, and, of course, subject to like taxation." (People *v.* Com'r, 4 Wall. 244, 258.) And in another case it was said: "Shares of stock may be within a state and the property of the corporation outside of it." (Kidd *v.* Alabama, 188 U. S. 730, 733.)

It does not appear how long the certificates in question had been in the state, or that they were here for some temporary purpose when they were sold by the relator to the complainant. For aught that appears they had been here for years in the possession of the owner, or deposited for safekeeping and had a situs here, so that they were subject to taxation here. They may have been bought here by the relator on the day of sale, and up to that time they may have been owned and in the possession of a resident of the state for year after year. The state found them here, and the presumption, in the absence of evidence to the contrary, is that they were subject to taxation here. If, owing to special circumstances, they were not, it was incumbent upon the relator to prove the fact. The legislature had the right to treat them as property and make them property for the purpose of taxation the same as it treats a bank deposit as money, although in reality it is a debt. (Matter of Houdayer, 150 N. Y. 37; Matter of Romaine, 127 N. Y. 80, 88.) We think that the tax, whether it is regarded as a tax on the sale of stock certificates or on the certificates themselves, touched neither person nor property without the jurisdiction of the state.

96 *Fifth.* The final objection urged against the statute is that it violates the commerce clause of the Federal Constitution because it taxes the transfer of certificates of stock in a foreign corporation when made by a non-resident in this state.

The commerce clause provides that Congress shall have power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." (Art 1, § 8, par. 3.) The omission of Congress to exercise this power in any case is an expression of its will that the subject shall be left free from restrictions upon it by the states. (Robbins *v.* Shelby County, 120 U. S. 489.) Commerce is the commanding word in the simple but weighty sentence quoted from the Constitution. What is commerce? According to the derivation, history and use of the word it is the exchange of property and includes the usual agencies of communication and transportation employed to effect the exchange. Thus it extends to whatever is used to move the property involved and the persons engaged in making the contract. Interstate commerce, or commerce among the states, means the exchange of property in one state for property in another state. Its essential characteristic is that the property affected must be transported to some point without the state. There must be interstate movement of property. The telegraph cases do not conflict with this view, for the telegraph practically transports either news or money. The interchange may be between residents of different states or residents of the same state, but the property exchanged must move from one state to another. There can be no interstate commerce without interstate transportation of property, which includes money as well as merchandise and whatever can become the subject of exchange.

Even upon the assumption that certificates of stock are property, the transaction in question involved no movement of property from one state to another, for so far as appears neither money nor property was brought into the state or taken out of it. A citizen of Connecticut met another citizen of that state in the city of New York and there bought the certificates of him, which were deliv-
97 ered and paid for on the spot. There is no statement in the record that the certificates were brought here to sell, or that the money used was brought here to purchase them. As we have seen, the certificates may have been here for years and this is true of the money also, for it belonged to a broker who carried on business at his office in the city of New York. There was an exchange of certificates for money made in this state, without the transportation of either from another state, as we must presume from the record. This was commerce but not interstate commerce, because no property moved from one state to another. It was not commerce among states, within the meaning of the Constitution, as we read it. The fact that both actors in the transaction were non-residents has no bearing on the question, for commerce among the states does not depend on the residence of the parties but on the interchange of property between different states. The exchange in question was made here, the property exchanged was situated here and, so far as we are advised, nothing was brought into or taken out of the state in

order to make the exchange, or as the result of the exchange as made. The fact that the certificates were issued by foreign corporations, operating railroads in other states, did not involve the movement of property from one state to another, any more than if A grants to B lands in Kansas by a deed given in this state. The stockholder's interest in the foreign corporation could not be brought into the state of New York and the certificates, which represent that interest, are presumed to have had a taxable *situs* here.

The discussion of this point has proceeded thus far on the theory that the tax is in substance a tax on property, but, as we have held, it is in fact a tax only on the privilege of transfer. But it is insisted that a tax on the privilege of transferring certificates issued by foreign corporations, when the transfer though made here is between non-residents, tends to prevent freedom of commercial intercourse and, hence, is a restraint upon interstate commerce. The direct effect of a tax on the privilege of making a contract in this
98 state, to be performed in this state, does not infringe upon interstate commerce because it does not involve the movement of property between states. Should the indirect effect be regarded as a restraint upon interstate commerce? If so, where is the application of the principle to stop, for if pushed to its logical conclusion the states will be prevented from managing their own affairs. The commerce clause was not intended to hamper state legislation, even if the indirect result should remotely affect commerce "among the several states." It was not designed to hinder the preservation of order or the procurement of means to that end by the taxation of transfers made within the state, even if they are from one non-resident to another and indirectly touch property without the state. It is the regulation of commerce that is impliedly forbidden and the regulation of commerce does not include everything distantly connected therewith. Remote and indirect results do not interfere with interstate commerce. A homely illustration will show my meaning. Two boys trade knives, that is commerce in its simplest form. If they live on opposite sides of a state line and the bargain is made on one side but delivery on the other, it is interstate commerce. If one of them is flogged for it, that is not interference with interstate commerce, even if it discourages interstate traffic. This example is not used to belittle an important subject, but to illustrate the fact that the indirect effect of state action is not prohibited, unless it discriminates against persons or property from other states, or necessarily has the effect of touching interstate commerce in some substantial way. A tax on the transportation of persons or property between states, or on the business of carrying it on, is direct *it* its effect and is a tax on commerce, but in a recent case, which held that a cab service maintained by a railroad for the use of interstate passengers is not interstate commerce, it was said: "Many things have more or less close relation to interstate commerce, which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is
99 engaged in interstate transportation, why is not the porter who carries the traveler's trunks from his room to the car-

riage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed? (New York *v.* Knight, 192 U. S. 21, affirming People *ex rel.* Penn. R. R. Co. *v.* Knight, 171 N. Y. 354.)

While interstate commerce, as such, cannot be taxed at all, the property employed therein may be taxed, even if it is used to facilitate interstate traffic, such as the rolling stock of a foreign railroad corporation running cars into one state from another. (Pullman Palace Car Co. *v.* Pennsylvania, 141 U. S. 18.) In deciding this case the court said: "There is nothing in the Constitution or laws of the United States which prevents a state from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction. (Citing Delaware R. R. Tax, 18 Will. 206, 232; Telegraph Co. *v.* Texas, 105 U. S. 460, 464; Gloucester Ferry Co. *v.* Penn., 114 U. S. 196, 206, 211; Western Union Telegraph Co. *v.* Attorney-General of Mass., 125 U. S. 530, 549; Marye *v.* Baltimore & Ohio R. R. Co., 127 U. S. 117, 124; Le Coup *v.* Mobile, 127 U. S. 640, 649.)" A railroad company engaged in interstate commerce and operating a railroad lying partly within and partly without a state "is liable to pay an excise tax according to the value of the business done in the state." (Maine *v.* Grand Trunk Ry. Co., 142 U. S. 217.)

A state cannot regulate interstate commerce, for Congress only has that power, but as it can tax property employed therein the same as all other property, it can tax the privilege of transferring such property, provided it treats non-residents the same as residents and subjects all transfers in the same class to the same tax. If there is no discrimination in favor of domestic commerce, there is no attack on interstate commerce, for the indirect effect of such a tax is no greater than one laid on property used therein. Taxation of a telegraph company, doing interstate business, upon its property within the state is valid, but a statute authorizing an injunction to restrain the company from transacting business until an overdue tax is paid, is invalid, because it interferes with an act of Congress relating to post roads. The tax did not interfere, as the result was indirect, but the injunction did, because it was direct in its effect. (Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530.)

A tax on the right to engage in interstate commerce, as by a commercial traveler, was held void as an attempt to regulate a subject under Federal control, but that is quite different in principle from a tax on all transfers of a certain kind of property, which, like all other property, may at times enter into interstate transactions, but is not peculiar thereto. (Robbins *v.* Shelby County, 120 U. S. 489.) The tax before us is not on the transfer of stock in foreign corporations, but on the transfer of stock in all corporations. "A uniform tax imposed by a state on all sales made in it, whether they be made by a citizen of it or a citizen of some other state, and whether the goods sold are the produce of the state enacting the law or of some other state, is valid," because "there is no attempt to discriminate

injuriously against the products of other states or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity possessed by the citizens of" the state in question. (Woodruff *v.* Parham, 8 Wall. 123, 140; Brown *v.* Houston, 114 U. S. 122; Emert *v.* Missouri, 156 U. S. 297; American Steel & Wire Co. *v.* Speed, 192 U. S. 500.)

So a tax on all meat-packing houses in a state, or on the agents thereof, is valid although some do an interstate as well as a domestic business. (Armour Packing Co. *v.* Lacey, 200 U. S. 232; Kehrer *v.* Stewart, 197 U. S. 60.) A tax on the gross commissions of brokers derived, wholly in one instance and partly in another, from sales made in behalf of many non-resident principals who shipped goods from without the state for sale, was held to affect interstate commerce only so "incidentally and remotely as not to amount
101 to a regulation" thereof. (Ficklen *v.* Shelby County, 145 U. S. 1.) Where the business of the brokers was not general, with the right to engage in all kinds, but was in terms limited to specific, non-resident principals, the effect was held to be direct and the tax void. (Stockard *v.* Morgan, 185 U. S., 27, 37. The cases distinguished, carefully and critically, between direct and remote results and with reason, for the Constitution is not sensitive to clouds on the horizon but to clouds overhead. In the nature of things every slight and incidental consequence of state action does not constitute state regulation, for this would lead to sad confusion and leave the subject in perpetual doubt. Attention should be paid to the interests of the state as well as those of the nation and a construction just to both should be adopted. The legislative power of the state should not be shackled, and the commerce clause of the Constitution should not be frittered away by extreme views in either direction. Immaterial, indirect and remote effects should be ignored and substantial results alone considered. As Mr. Justice Peckham recently said: "The effect upon the commerce spoken of must be direct and proximate. (N. Y., L. E., O. & W. R. R. Co. *v.* Penn., 158 U. S. 431, 439.) An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct." (Hopkins *v.* United States, 171 U. S. 578, 594, citing Sherlock *v.* Alling, 93 U. S. 99, 103; United States *v.* E. C. Knight Co., 156 U. S. 1, 16; Pittsburg & Southern Coal Co. *v.* Louisiana, 156 U. S. 590, 597; Transportation Co. *v.* Parkersburg, 107 U. S. 691; Ficklen *v.* Shelby County, 145 U. S. 1.)

The principles governing interstate commerce are in process of development, and, as is usually true in evolving the law out of many complicated cases, the treatment by the courts has not always been uniform or consistent. We think, however, that the weight of authority regards state legislation, which treats all persons, all property and all transfers of the same class in the same way under the
102 same circumstances, and which does not directly or materially touch interstate commerce, as not amounting to state regulation. While restraint by the state is regulation by the state, it must

be direct or substantial to have that effect, and the statute under consideration falls under neither head. The question is not whether the statute is wise, but whether it is valid, and we think it is valid.

The order appealed from should be affirmed.

Cullen, Ch. J., O'Brien, Haight, Werner, Willard Bartlett and Hiscock, JJ., concur.

Order affirmed.

A copy.

E. A. BEDELL, *State Reporter.*

C.

103 STATE OF NEW YORK:

Court of Appeals, Clerk's Office.

I, W. H. Shankland, Clerk of the Court of Appeals of the State of New York, do hereby certify that the foregoing copy of the opinion written by Irving G. Vann, an Associate Judge of the Court of Appeals, of the State aforesaid, in the case of The People of the State of New York *ex Rel.* Albert J. Hatch, Appellant against Edward Reardon, a Peace Officer of the County of New York, Respondent, has been duly compared by Edwin A. Bedell, State Reporter, and that he has certified that the same is a true and correct copy of the original thereof now in his custody.

In witness whereof, I have hereunto set my hand and affixed my official seal at the City of Albany, this twenty-eighth day of May, A. D., 1906.

[Seal State of New York, Court of Appeals.]

W. H. SHANKLAND, *Clerk.*

Endorsed on cover: File No. 20,275. New York supreme court. Term No. 310. The People of the State of New York *ex rel.* Albert J. Hatch, plaintiff in error, *vs.* Edward Reardon, a peace officer of the county of New York. Filed June 2d, 1906. File No. 20,275.